In The

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

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JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] not yet officially reported, appears in the Appendix hereto (23a). It affirms the decision of the United States District Court for the Southern District of New York (Werker, J.), reported at 443 F. Supp. 253 (S.D.N.Y. 1977), and appended hereto (1a) which upheld the constitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (hereinafter "PWEA" or the "Act"), which provides for a set-aside of 10% participation in programs under the Act for minority business enterprises as defined therein.

JURISDICTION

This petition for certiorari has been filed within 90 days of the entry of judgment of the Court of Appeals on September 22, 1978. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Congress' requirement that 10% of federal grants for local public works projects be set aside for minority business enterprises is constitutionally permissible under the Due Process or Equal Protection Clauses of the federal Constitution.

2. Whether the minority set-aside is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*

---

1. Oakes, Circuit Judge; Blumenfeld, Senior District Judge for the District of Connecticut; Mehrtens, Senior District Judge for the Southern District of Florida.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) provides for the 10% minority business set-aside:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The provisions of the PWEA are appended hereto (42a).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

A. The Proceedings

This action was commenced on November 30, 1977. The complaint sought, along with other relief, a judgment declaring that portion of the federally enacted Public Works Employment Act of 1977, which provides for an appropriation set-aside to minorities, contrary to statute and unconstitutional. Petitioners moved for a temporary restraining order, which was denied by the District Court (Hon. Henry F. Werker, Judge). The Court thereupon consolidated petitioners' application for a preliminary injunction with a trial on the merits, which was held on December 2, 1977.

The trial consumed one day, during the course of which the District Court heard three witnesses and received eleven exhibits. On December 19, 1977, the District Court issued its Opinion and Order upholding the constitutionality and legality of the applicable portion of the statute.

On September 22, 1978, the Court of Appeals for the Second Circuit affirmed the decision below.

B. The Facts

The petitioners are comprised of various individuals and contractor groups which perform both general contracting and specialty subcontracting work on various construction projects including those let by the State and City of New York and their various agencies.

Petitioners challenge the constitutionality and compliance with Title VI of the Civil Rights Act of 1964, of Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. §6705(f)(2), which is set forth at p.43a, *supra.*

The PWEA was enacted by Congress on May 13, 1977. Purportedly, it was intended to correct certain inadequacies in the Local Public Works Capital Development and Investment Act of 1976, 90 Stat. 999-1012, Pub. L. No. 94-369 (hereinafter "LPWA") and to increase the funding of the LPWA by an additional four billion dollars.

The intentions of Congress in enacting the LPWA, as reported by the Committee on Public Works and Transportation of the House of Representatives, were twofold:

(1) to alleviate the problems of national unemployment, and;

(2) to stimulate the national economy by assisting state and local governments to build badly needed public facilities.

The LPWA charged the Economic Development Administration ("EDA"), under the direction of the Secretary of Commerce, with the task of processing applications from the various state and local governments seeking assistance thereunder for local public works projects (designated as "Round I").

When it became clear that the LPWA was not adequately fulfilling the intentions of Congress, public hearings were held by the House Subcommittee on Economic Development, which contained certain objectives to be met in the next round of funding ("Round II"). That same subcommittee thereafter recommended that H.R. 11, the House version of PWEA, be enacted as reported and concluded that the amendments made by the bill to the LPWA would meet those objectives mentioned above. This report was issued on February 16, 1977. On February 24, 1977, on the floor of the House, during the debate on H.R. 11, an amendment was offered by Representative Parren Mitchell (D. Md.), which, with slight modification, was approved and eventually enacted as Section 103(f)(2), 42 U.S.C. §6705(f)(2), and is now known as the Minority Business Enterprise ("MBE") provision. This provision had not been previously considered by any House committee or subcommittee, and after brief debate following its introduction, the amendment was approved on the floor of the House.

The final version of the PWEA, containing the MBE provision, was enacted by Congress on May 13, 1977.

Pursuant to the terms of the PWEA, the local grantees, including the City and State of New York have received federal funding for various municipal projects. These projects have been and continue to be let under contacts, the terms of which include the various MBE requirements.

THE REASONS FOR GRANTING A WRIT

I.

THE QUESTION OF MINORITY SET-ASIDES IN FEDERALLY FUNDED PROJECTS IS A TOPICAL ISSUE OF PERVASIVE AND SUBSTANTIAL PROPORTIONS.

The issue of the constitutionality of congressional action in formulating this minority set-aside was before this Court in *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded,* 98 S. Ct. 3132 (1978) which was remanded to the lower court for a determination on the question of mootness. The lower court has since determined that the matter has not been mooted. Accordingly, a notice of appeal to this Court under 28 U.S.C. §.252 has been filed by the City of Los Angeles. There the lower court had found the set-aside provision unconstitutional and invalid under the provisions of Title VI. Similarly in *Montana Contractors' Ass'n v. Secretary of Commerce,* CV 77-62-M (D. Mont. filed November 24, 1978) it is anticipated that the Secretary of Commerce will file a direct appeal to this Court from a determination of the lower court's holding the set-aside provision unconstitutional. A third district court has found the statute in issue to be unconstitutional as applied. *Wright Farms Constr., Inc. v. Kreps,* 444 F. Supp. 1023 (D. Vt. 1977).

The permissible scope of federal legislation which effectuates broad based social policies through the use of racial classifications is a question the parameters of which must be clearly delineated in the wake of *Regents of the University of California v. Bakke,* 98 S. Ct. 2733 (1978) (hereinafter *"Bakke"*). There, this Court was confronted with the issue of voluntary quotas imposed by a state medical school to alleviate a discrepancy in enrollment it perceived between non-minority and minority students. In the instant case, the question transcends

the imposition of voluntary quotas and goes directly to the competence of the congressional branch of government to formulate a quota system respecting minority involvement when federal funds are utilized in municipal construction projects.

This Court in *Bakke* questioned the imposition of affirmative action remedies in the absence of "a judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2754. The Court likewise could uphold racial preferences "where a legislative or administrative body charged with the responsibility made determinations of past discrimination . . ." *Id.* The instant case presents squarely the question of the propriety of Congress to act in fashioning remedies which involve what might be deemed invidious racial classifications. To what extent and in what manner Congress, as a branch of government, can act in such a situation is a question of paramount importance. If congressional action and the ability to obtain federal funding can be conditioned on the imposition of racial classifications, it is of primary constitutional import that Congress satisfy those precise constitutional safeguards formulated by this Court to test legislative action in the area of such classifications.

The instant case involves the precise issue of the standards to be complied with when Congress acts in this area. The cases are legion in formulating standards of procedural due process to guide the courts in all areas, including race discrimination cases. The standards to be followed by Congress or any legislative body in formulating precisely the same remedies are anything but clear. The lower court in the instant case abandoned the strict scrutiny test in favor of a test of "fundamental fairness" (37a). The Court in *Bakke* spoke both in terms of the strict scrutiny test to be applied to all racial classifications, *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2753 (Powell opinion) and a test formulated to measure classifications based on race which were formulated to rectify instances of past discrimination. *Id.* at 2787 (Brennan opinion).

This Court has recognized the need for legislative determinations in the area of race discrimination. *Id.* at 2757-58. It is of paramount interest that the tests of legislative action be precisely formulated so that the action of the legislative bodies in so delicate an area can be accurately measured. The instant case calls into question the actions of Congress in formulating a nationwide racial classification where the congressional record is devoid of any findings of discrimination in the construction industry and utterly devoid of any legislative inquiry in the area of alternative means involving less discriminatory methods. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 16-17 (1973). It accordingly involves the scope of judicial inquiry into acts of Congress involving due process and equal protection classifications and the deference, if any, accorded Congress when it imposes such classifications. Since Congress has undertaken to act affirmatively in the area of civil rights, the general welfare requires that Congress not be used as an instrument of discrimination.

II.

THE DECISION BELOW IS IN CONFLICT IN PRINCIPLE WITH THIS COURT'S DECISION IN *BAKKE* AND RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL AND FEDERAL LAW NOT DECIDED THEREIN.

A. Least Discriminatory Means Available

While completely ignoring the two prong directives that this Court established in *Loving v. Virginia,* 388 U.S. 1, 11 (1967) and *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972), that when a classification is based upon race, it must be shown to be necessary *and* the least discriminatory means available to the accomplishment of a valid state objective, the Court of Appeals paid mere lip service to Mr. Justice Powell's formulation in *Bakke* that such racial classification must be *precisely tailored* and work the *least* harm possible to innocent persons. *Regents*

of the University of California v. Bakke, supra, 98 S. Ct. at 2753, 2758. Rather, the Court of Appeals in this case merely substituted its judgment in place and stead of the appropriate standard and found that so long as the remedies based upon the classification are "appropriately drawn", and do not exceed "fundamental fairness", such reverse discrimination will be sustained (36a-37a). This novel Court of Appeals' fashioned test does not even subject the classification to the more relaxed standard as expressed in Mr. Justice Brennan's opinion in *Bakke,* that not only must such remedy be substantially related to achievement of important governmental objectives, but it also must not stigmatize any group or single out those least represented in the political process to bear the brunt of the benign program.[2] *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2784-85. The stigmatization in the case at bar is obvious. Similar to the special admission program utilized in *Bakke,* those contractors who do not fit within the select MBE category are never afforded a chance to compete for the special set-aside monies, no matter what the quality of their work product or the extent of their underbid of an MBE for a public work project. *(See, e.g., Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2764.) So, for example, a small business owned perhaps by a Caucasian immigrant, which is every bit as disadvantaged as a similarly situated MBE, is, by operation of the PWEA, excluded from obtaining at least 10% of the construction work funded under the Act. It is this very portion of the work which is preempted under the Act that such

2. In fact, the Brennan position even acknowledged that the least onerous alternative test is still viable if "fundamental rights" are restricted. *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2782. In *Bakke,* however, it was noted that education was not afforded implicit or explicit protection under the Constitution, and accordingly no fundamental right involved. *Id.* at 2783 *citing San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 29-36 (1973). It is undeniable, however, that at issue in the instant petition is the right to work which this Court has traditionally found to be a fundamental right. Slaughter House Cases, 16 Wall. 36 (1872).

a disadvantaged non-MBE is most likely to strive to obtain due to his limited size and capabilities. Conversely, similar to those racially preferred students in *Bakke,* the preferred minority business enterprises can compete for the full extent of the appropriated monies. The stigma is not one of mere semantics where a disregard of individual rights due to a person's color is sanctioned by the Congress of the United States.

If indeed the least onerous alternative requirement of the two prong test utilized in legislative classifications based upon race is to be abandoned in favor of either the Brennan position or the Court of Appeals' designed test, it should take place only at the behest and with the express sanction of this Court.

B. Prior Discrimination and Congressional Findings

This Court in *Bakke* left unresolved whether in fact race conscious remedies were permissible in the absence of express findings of past discrimination or discriminatory impact. While Justice Brennan concluded that such findings were not a prerequisite, Justice Powell's opinion stated that benign classifications are invalid in the absence of detailed legislative, judicial or administrative consideration found in the record, of prior discrimination with a consequent definition of the extent of injury caused by such discrimination. *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2789 (Brennan findings); *id.* at 2757, 2755 n. 41 (Powell opinion). Here, the Court of Appeals, although reaching the obvious conclusion that legislative consideration of the MBE amendment was indeed "sparse", relied upon its sponsor's off the cuff remarks in concluding that the construction industry had been guilty of past discrimination (33a-34a). These scant remarks, characterized by one court as the mere debate rhetoric of a partisan, *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 969 (C.D. Cal. 1977), *vacated and remanded,* 98 S. Ct. 3132 (1978), *on remand,* ____F. Supp.____(C.D. Cal. 1978), coupled with the Court of Appeals'

completely unsupportable statement that the lack of congressional discussion was understandable in light of "the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry" (34a n.10), formed the basis for the upholding of this wholesale indictment of the construction industry. The Court of Appeals' analysis of the record thus presumed the very fact in issue, aided only by the unexpressed mental processes of Congress.

Moreover, although alluding to that portion of Justice Powell's opinion which noted a "special competence" accorded Congress where it sought to abolish the badges and incidents of slavery either by broadening such fundamental rights as voting, [*Katzenbach v. Morgan,* 384 U.S. 641 (1966)], or by prohibiting private discrimination [*Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968)],[3] the Court of Appeals failed to recognize that legislation which is based upon racial classification does not warrant that degree of judicial restraint and/or deference as it does when its goal is to afford equality. In fact, this Court has not yet addressed the issue of the proper standard of judicial review where legislation, albeit benign, classifies, discriminates and excludes from participation a segment of the population based upon race. As the benign discriminatory purposes of the set-aside in appropriations become the ever-increasing topic of the future, it becomes imperative for this Court to define the parameters of judicial review.

C. The MBE Amendment's Conflict with Title VI of the Civil Rights Act of 1964.

In addition to the constitutional shortcomings of this expenditure program, the MBE provision in its express terms represents a patent conflict with the clear and explicit provisions of Title VI of the Civil Rights Act of 19[illegible], Section 601, 42 U.S.C. §2000d. The two congressional enactments represent

3. *See Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2755 n. 41.

statements of congressional policy which by their terms, are contradictory. When national policy objectives are fully understood, it is clear that the congressional mandate embodied in Title VI requires that the race quota embodied in the MBE provision be invalidated as a "flagrant violation of both the congressional intent and national policy" represented by the Civil Rights Act, *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977). The circuit court, in its decision, failed to even consider the Title VI violation.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: Garden City, New York
December 18, 1978

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 19, 1977 (WERKER, J.)

H. Earl FULLILOVE, Fred Munder, Jeremiah Burns, Joseph Clarke, Gerard A. Neuman, William C. Finneran, Jr., Peter J. Brennan, Thomas Clarkson, Conrad Olsen, Joseph DeVitta, as Trustees of the New York Building and Construction Industry Board of Urban Affairs Fund, Arthur Gaffney as President of the Building Trades Employers Association General Contractors Association of New York, Inc., General Building Contractors of New York State, Inc., and Shore Air-Conditioning Co., Inc., Plaintiffs,

v.

Juanita KREPS, Secretary of Commerce of the United States of America, the State of New York, the City of New York, Board of Higher Education and Board of Education of the City of New York and Health and Hospitals Corporation, Defendants.

No. 77 Civ. 5786 (HFW).

United States District Court,
S.D. New York.

Dec. 19, 1977.

Associations of construction contractors and subcontractors, and others, brought a civil rights action to prevent the Secretary of Commerce and others from enforcing a section of the Public Works Employment Act of 1977 which required ten percent minority business enterprise participation in any local public works projects funded thereunder. The District Court, Werker, J., held that the MBE requirement was a

constitutional method of remedying prior acts of discrimination in the construction industry and one which was fully consistent with civil rights laws that preceded it.

Complaint dismissed.

1. Constitutional Law ⊙ 215.2, 253(2) United States ⊙ 82(3)

Provision of Public Works Employment Act of 1977 requiring ten percent minority business enterprise participation in any local public works project funded by Act did not violate equal protection or due process clause of Fifth Amendment to United States Constitution, but MBE requirement was entirely constitutional method of remedying prior acts of discrimination in construction industry. Local Public Works Capital Development and Investment Act of 1976, §§106(e)(1), (f)(2), 107, 107 as amended 42 U.S.C.A. §§6705(e)(1), (f)(2), 6706, 6708; U.S.C.A. Const. Amends. 5, 14; Act May 13, 1977, 91 Stat. 122; Civil Rights Act of 1964, §§601, 701 et seq., 42 U.S.C.A. §§2000d, 2000e et seq., Rules and Regulations, §1-30.400 et seq., 41 U.S.C.A. Appendix; Small Business Act, §2[8](a), 15 U.S.C.A. §637(a); 42 U.S.C.A. §§1981, 1983, 1985.

2. United States ⊙ 82(3)

Provision of Public Works Employment Act of 1977 which requires ten percent minority business enterprise participation in any local public works project funded under Act was consistent with provisions of Civil Rights Acts of 1866 and 1964. Local Public Works Capital Development and Investment Act of 1976, §106(f)(2) as amended 42 U.S.C.A. §6705(f)(2); Civil Rights Act of 1964, §§601, 701 et seq., 42 U.S.C.A. §§2000d, 2000e et seq.; 42 U.S.C.A. §§1981, 1983, 1985.

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Robert B. Fiske, Jr., U.S. Atty. for the Southern District of New York, New York City by Mary C. Daly, Gaines Gwathmey, III, Gerald Hartman, Dept. of Justice, Washington, D.C., for defendant Secretary of Commerce.

MEMORANDUM DECISION

WERKER, District Judge.

The plaintiffs in this civil rights action, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work, by order to show cause seek declaratory and injunctive relief to prevent the Secretary of Commerce, as the program administrator, and the remaining defendants, as potential project grantees, from enforcing section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (the "Act"), which requires 10 percent minority business enterprise participation in any local public works project funded

thereunder.[1] Plaintiffs allege in their complaint that section 103(f)(2) of the Act (the "MBE requirement") violates the equal protection clause of the fourteenth amendment and hence also the due process clause of the fifth amendment.[2] Plaintiffs further allege that the MBE requirement is violative of the clear Congressional policy underlying the Civil Rights Acts of 1866 and 1964.

Similar allegations have recently been considered in several other districts.[3] It appears, however, that none of those courts have reached a final decision on the merits and, as a consequence, this may well be the first decision squarely holding

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1. Under section 103(f)(2) of the Act a minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members, are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

2. Although the fifth amendment contains no express equal protection clause, it has been held that the due process clause of that amendment incorporates fourteenth amendment equal protection elements. *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040 48 L. Ed.2d 597 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

3. *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977); *Ohio Contractors Association v. Economic Development Administration*, No. 77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association v. Higgins*, 439 F. Supp. 1331 (D. Mont. 1977); *Associated General Contractors of Wyoming, Inc. v. Secretary of Commerce*, No. 77-222 (D. Wyo. Nov. 4, 1977); *Florida East Coast Chapter of the Associated General Contractors of America v. Secretary of Commerce*, No. 77-8351 (S.D. Fla. Nov. 3, 1977); *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Calif. 1977); *Constructors Association of Western Pennsylvania v. Kreps*, 441 F. Supp. 936 (W.D. Pa. Oct. 13, 1977).

that the MBE requirement is an entirely constitutional method of remedying prior acts of discrimination in the construction industry and one which is fully consistent with the civil rights laws that preceded it.[4]

BACKGROUND

The complaint in this action was filed on November 30, 1977 and an initial hearing on plaintiffs' order to show cause was held the same day. At the close of that hearing, the Court denied plaintiffs' request for a temporary restraining order and, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, set the matter down for a consolidated hearing on the application for a preliminary injunction and trial on the merits the following day. The court further directed that each defendant file a memorandum of law at the time of the preliminary injunction hearing and trial.[5] That proceeding took place on November 31 and December 2, 1977, and further memoranda have since been filed. Although the Secretary has expressed concern about the speed with which this matter proceeded to a trial, that issue, quite obviously, has been mooted by the determination reached herein.

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4. In *Wright Farms, supra*, Judge Coffrin set down a hearing on a preliminary injunction and trial on the merits for December 12, 1977. There is no indication, however, that he has yet issued any opinion following that proceeding.

5. At the time of the initial hearing, plaintiffs had not served the Health and Hospitals Corporation of the City of New York, the New York City Board of Education or the New York City Board of Higher Education, each of which is a separate governmental entity. Accordingly, the Court directed that by 5:00 p.m. the following day each of these defendants be personally served with plaintiffs' complaint and accompanying papers. At the consolidated hearing and trial, Theodore Gilbert, Esq., an Assistant Corporation Counsel for the City of New York, entered an additional appearance on behalf of the Board of Education, but no one has appeared for either the Board of Higher Education or the Health and Hospitals Corporation.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

HISTORY OF THE MBE REQUIREMENT

The Act was passed to extend the provisions of Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94—369, 90 Stat. 999—1012 (1976), under which Congress appropriated $2 billion to stimulate the national economy and the sagging construction industry by providing direct grants to state and local governments for the construction of public facilities which would immediately create a substantial number of jobs.[6] See H.R.Rep.No.1077, 94th Cong., 2d Sess. (1976). To assure that the program would actually be of direct benefit to the construction industry, the Act added a requirement that private firms, and not governmental units, perform any work funded. Act §103(e)(1), 42 U.S.C. §6705(e)(1); H.R.Rep.No.20, 95th Cong., 1st Sess. 4 (1977). An additional expenditure of $4 billion for construction projects was authorized under section 109 of the Act, 42 U.S.C. §6708, and Congress subsequently appropriated $2 billion for that purpose under what is commonly known as "Round Two" of the Local Public Works Program. Economic Stimulus Appropriations Act, Pub.L. No. 95—29, 91 Stat. 122, 124 (1977).

When the Act was being considered on the floor of the

6. In the City of New York alone, $193,838,646 has been awarded for 83 projects to be built under the Act. It has been estimated that the New York City projects will generate "approximately 6,348,842 hours of employment, the equivalent of a full year of employment for 5039 construction workers." It is further anticipated that these projects will generate the equivalent of a full year of employment for 1618 workers in construction-related industries. Spending generated by these individuals and their employers is expected to produce at least an additional 18,644 person years of employment. Affid. of Anthony J. Sulvetta, Chief of the Program Analysis Division of the Economic Development Administration, sworn to Dec. 1, 1977, at 2, 4. The impact of Act-funded projects on the national economy is equally dramatic. *Id.* at 4-5.

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House, Representative Parren Mitchell of Maryland introduced an amendment subsequently incorporated into the Act as the MBE requirement. *See* 123 Cong.Rec. H 1437—41 (daily ed. Feb. 24, 1977). That provision, in its present form, reads as follows:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

The Secretary of Commerce, pursuant to authority granted her under section 107 of the Act, 42 U.S.C. §6706, has also promulgated regulations to carry out the terms of the MBE requirement while still affording an escape mechanism to contractors doing business in areas where compliance with the 10 percent set-aside is impossible.[7] Under the regulations, a project *grantee,* not the contractor, can seek a waiver of the MBE requirement when it first applies for a grant or, if

7. The regulations, which appear at 42 Fed. Reg. 27,434-35 (1977) (to be codified in 13 C.F.R. §317.19), provide in pertinent part as follows:

> (b) Minority business enterprise. (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

necessary, at any later time—provided that sufficient supporting information is furnished to the reviewing officer. *See* Affid. of M.L. Banner, Chief of the Atlantic Regional Office of the Economic Development Administration, sworn to December 5, 1977. Moreover, the Department of Commerce has issued two sets of interpretive guidelines and a technical bulletin to assist project grantees in their efforts to comply with the MBE requirements.[8]

DISCUSSION

A. *Constitutionality of the Act.*

[1] The first issue presented to the Court is whether the MBE requirement incorporates a constitutionally impermissible racial or ethnic quota, as plaintiffs suggest, or merely, as defendants argue, a legislative preference intended to remedy the adverse effects of past or present discrimination. Although the Secretary of Commerce steadfastly maintains that the MBE requirement should be considered as a goal which can be waived "where facts show that enforcement would be impractical,"[9] Secretary's Memorandum in Opposition to Plaintiffs' Motion at 13, and presumably that it should therefore be subject to some lesser standard, the Court need not enmesh itself in the goal

8. Economic Development Admin., U.S. Dep't of Commerce, Guidelines for Round II of the Local Public Works Program (June 1977); Guidelines for 10% Minority Business Participation in LPW Grants (Aug. 1977); Minority Business Enterprise Technical Bulletin (Oct. 1977).

9. The Secretary's argument is, in this regard, overstated, for waivers are only granted "under exceptional circumstances." Guidelines for 10% Minority Business Participation in LPW Grants, *supra*, at 13. One court has accurately described the waiver criterion as one of practical impossibility. *Ohio Contractors Association v. Economic Development Administration*, slip op. at 14.

versus quota controversy, for resolution of the constitutional question presented by the plaintiffs would not be advanced one iota by such an exercise. No matter how the MBE requirement is characterized, it cannot be denied that it distinguishes among various business enterprises, at least in part, based upon the racial background of their principals. Consequently, since its operation involves the use of an inherently "suspect" classification, rigid scrutiny of both Congressional purpose and the means selected to effectuate that purpose is clearly mandated. *See Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Two standards must therefore be met under the traditional formulation. First, the governmental objective advanced by the Act must be shown to serve a "compelling state interest." *See Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); second, defendants must demonstrate that other available means of accomplishing the objective would not, in practice, prove to be less discriminatory.[10] *Dunn v. Blumstein*,

10. The Secretary contends that the proper standard for evaluation of legislative classifications that are inherently suspect has been recently set forth in *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855, 37 L. Ed.2d 910 (1973), under which the United States need only show:

> that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary to the accomplishment" of its purpose or the safeguarding of its interest. (Footnotes omitted.)

The Supreme Court expressly noted, however, that characterizing the requisite state interest as "overriding" or "compelling" or "substantial" signifies no substantive distinction, *id.* at 722 n. 9, 93 S. Ct. 2851. Furthermore, the Court sees no real difference between the *Griffiths* requirement that the classification be necessary and the concept that the classification must be narrowly drawn. The Court therefore adheres to the more frequently cited rigid scrutiny formula.

405 U.S. 330, 337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Loving v. Virginia,* 388 U.S. at 11, 87 S.Ct. 1817; *Associated General Contractors of California v. Secretary of Commerce,* 441 F.2d at 964. It is the Court's view that both of these requirements have been met in this action.

1. *Compelling Interest Analysis.* Plaintiffs concede that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," Plaintiffs' Memorandum in Support of Preliminary Injunction at 10, but argue that the formal legislative history of the Act is devoid of any indication that Congress wished to assist minorities, rather than economically disadvantaged groups in general. *Id.* at 965. The Congressional purpose underlying enactment of the MBE requirement cannot be discerned merely by examining the reports of the Senate and House committees that considered the Act, however, because the minority business set-aside was not proposed until a relatively late date in the draft bill's history and was therefore never considered by any Congressional committee. *See Associated General Contractors of California v. Secretary of Commerce,* 441 F.2d at 969. Thus, even though the House Public Works and Transportation Committee called for federally financed or assisted public works projects as a "dual purpose instrument to help revitalize the Nation's financially-pressed communities and reactivate the distressed construction industry," H.R.Rep.No.20, 95th Cong., 1st Sess. at 1, there may well be other, equally important reasons for passage of the Act by Congress. As Professor Dickerson has aptly noted, there is frequently "a congeries of purposes" behind a bill. R. Dickerson, The Interpretation and Application of Statutes 89 (1975). It is therefore necessary, in the Court's view, to consider both the "debate rhetoric" surrounding introduction of the MBE requirement and the societal and legislative context within which that provision was meant to operate. *See Katzenbach v.*

Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) in which the Court discussed what Congress *might have found* in enacting challenged legislation.

Turning first to the floor debate, the Court finds that the remarks made in support to remedy prior wrongs to minority groups, not merely, as plaintiffs contend, a general desire to assist economically pressed construction contractors, subcontractors and vendors. For example, Representative Mitchell noted in his remarks that the federal government's program of assistance to minority business permits them to become "viable entities in our system" only to be "cut off" when contracts are awarded, and he added that "the only way that we are going to get the minority enterprises into our system" is by setting aside funds. 123 Cong.Rec. H 1437 (daily ed. Feb. 24, 1977). Representative John Conyers of New York, who also spoke in favor of the Mitchell amendment, observed perhaps a bit more directly that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time." Id.* at H 1440 (emphasis added). *See also* remarks of Representative Biaggi at *id.* ("Nation's record with respect to providing opportunities for minority businesses is a sorry one"); and remarks of Senator Brooke, *id.* at S 3910 (daily ed. Mar. 10, 1977) (noninvolvement of minority business exists despite legislation, executive orders and regulations).

It is true that these statements do not expressly attribute the difficulties encountered by minority business enterprises to prior racial discrimination, but whatever ambiguity is present is easily resolved when the available empirical data is examined. Thus, although the United States has a minority population of approximately 17 percent, only about four percent of all businesses are controlled by members of minority groups, and they account for less than one percent of national gross business receipts. Office of Minority Business Enterprise, United States

Dep't of Commerce, Minority Business Opportunity Handbook at I—1 (August 1976) ("Minority Handbook").[11] Minority businesses also receive less than one percent of the $120 billion in government contracts awarded annually. United States Comm'n on Civil Rights, Minorities and Women as Government Contractors 2, 6 n. 10 and 86 (May 1975). Plaintiffs question the soundness of the data contained in the reports relied upon by the Secretary, and point to recent increases in the number of minority businesses and the amount of their dollar receipts,[12] Plaintiffs' Post-Trial Memorandum at 10, but even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to have concluded that "the severe shortage of potential minority entrepeneurs with general business skills is a result of their historic *exclusion* from the mainstream economy." *See* Minority Handbook at I—1—2 (emphasis added).

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11. A House committee recently suggested slightly different statistics:

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only 16.6 billion or about 0.65 percent was realized by minority business concerns.

Report of the House Committee on Small Business, H. R. Rep. No. 1791, 94th Cong., 2d Sess. 124 (1977).

12. Between 1969 and 1972, the number of minority owned construction firms increased by 34 percent while gross receipts for such firms rose 84 percent. Bureau of the Census, U.S. Dep't of Commerce, 1977 Survey of Minority-Owned Business Enterprises (May 1975).

In fact, it appears that a House subcommittee has made that very finding. In reviewing the record of certain federal programs for minority business enterprises, the House Subcommittee on Small Business Administration Oversight and Minority Enterprise observed that:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.

Report of the House Committee on Small Business, H.R.Rep.No.1791, 94th Cong., 2d Sess. 124 (1977).

The subcommittee furthermore noted that

> over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular.

Id. at 182

Where there is, as here, a statistical disparity between the representation of minority groups in the general population and

the degree of their involvement in economic activity, the Court believes that Congress could reasonably believe that prior racial discrimination was the cause.[13] *See, e.g., Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768, 45 U.S.L.W. 4882 (U.S. June 28, 1977); *Constructors Association, of Western Pennsylvania v. Kreps,* 441 F.Supp. 936. However, even if the members of Congress were not aware of the relevant statistical information at the time that they adopted the MBE requirement, certainly they must have acted with knowledge of the many federal antidiscrimination measures implemented over the past several years.[14] When the Mitchell amendment is considered against the background of those programs, it becomes rather obvious that the MBE requirement was incorporated into the Act after only brief debate because of a general awareness of the compelling need for legislative action capable of overcoming the effects of prior discrimination against minority businesses seeking to

13. Plaintiffs contend that under *Equal Employment Opportunity Commission v. Local 14,* 553 F.2d 251, 255 (2d Cir. 1977), the Secretary should only be entitled to marshal post-1965 statistics since Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000d and 2000e *eq seq.,* were not effective prior to then. The question before the Court, however, is what Congress could rightfully infer as to the reason for the poor showing of minority enterprises in our national economy; passage of the Civil Rights Act of 1964 is entirely irrelevant in that regard.

14. Judge Snyder catalogued many of the federal programs in *Constructors Association of Western Pennsylvania v. Kreps,* op. at 951 n. 8, and the reader is referred to that source for a summary description of the federal effort. The Secretary maintains that there are some 35 federal assistance programs designed particularly for minority enterprises. *See* Office of Minority Enterprise, U.S. Dep't of Commerce, Federal Assistance Programs for Minority Business Enterprises (1977).

participate in government contracting.[15]

None of the evidence introduced at the hearing held in this matter even remotely suggests a contrary conclusion. At best, the testimony shows that construction contractors in the New York City area have not engaged in any concerted effort to discriminate against minority subcontractors and venders.[16]

15. Plaintiffs contend that the federal amelioratory scheme consists of remedies, which "cannot be substituted for the necessary clear basis of legislative findings and reliance to validate this act." Plaintiffs' Post-Trial Memorandum at 13-14. However, the critical issue before the Court is not whether Congress, in enacting the MBE requirement into law, actually made an express finding that there was prior racial discrimination in the construction industry; the issue, more properly, is whether such a finding would have been justified. As the Supreme Court noted in *Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S. Ct. 1717, 1725, 16 L. Ed.2d 828 (1966), "any contrary conclusion would require us to be blind to the realities familiar to the legislators." *Cf. Ohio Contractors Association v. Economic Development Administration,* slip op. at 17 (Court need not explore whether particular legislative act in question actually serves compelling interest so long as it falls within confines of well-established state interest.

16. Plaintiffs proffered the testimony of two construction contractors whose firms had submitted bids for projects funded under the Act. Both witnesses stated that their firms had been the successful bidder on projects requiring minority business enterprise participation and intended to submit further bids for additional Act-funded projects; that the 10 percent MBE requirement made it necessary for them to deal with minority subcontractors and venders whom they would not otherwise employ in connection with specified projects; and that they had each used minority venders or subcontractors on previous projects even though that was not required by the bid specifications for those projects. The sole witness for the Secretary was an Assistant Commissioner of the New York State Commission on Human Rights who, in essence, conceded on cross examination that he knew of no concerted effort by construction contractors to discriminate against minority business enterprises in the City of New York.

(Cont'd)

Although a host of labor union discrimination cases make that proposition rather dubious,[17] even if it were to be accepted, *arguendo,* based upon the disgraceful record of minority enterprise involvement in our national economy, Congress could still find that racial discrimination against minority businesses remained a serious problem in many *other* areas of the country. And as even plaintiffs have admitted, that is a problem the

(Cont'd)

One of the construction contractors testified that he was meeting the MBE requirement for construction of a tide gate regulator by purchasing the mechanical equipment at somewhat increased cost from a minority vender, rather than acquiring it directly from the manufacturer as he normally would. Transcript at 39-40. At the time of the hearing, the Court was rather critical of this practice, which it suggested really amounted to incorporation of a welfare program within a public works project. Transcript at 66. According to the Secretary's published guidelines, however, "only the commission or fee earned by the MBE may be counted toward the 10% requirement" when the MBE "acts merely as an agent or a relatively passive conduit in connection with the provision of services or materials." Indeed, "even this commission or fee will not be counted if the MBE performs no substantive services and is a totally passive conduit." Minority Business Enterprise Technical Bulletin, *supra,* at 3-4. This restriction may make it even more difficult for nonminority contractors to comply with the MBE requirement but it certainly resolves any concern the Court may have had over possible squandering of federal funds. Furthermore, the restriction increases the likelihood that minority firms will be involved in large-scale construction projects in a meaningful way.

17. *E.g., EEOC v. Local 638,* 401 F. Supp. 467 (S.D.N.Y. 1975), *modified,* 532 F.2d 821 (2d Cir. 1976), *aff'd after remand,* 565 F.2d 31 (2d Cir. 1977); *United States v. Local 638, Enterprise Association Steamfitters,* 360 F. Supp. 979 (S.D.N.Y. 1973), *modified sub nom. Rios v. Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *United States v. Local 638, Enterprise Association Steamfitters,* 347 F. Supp. 169 (S.D.N.Y. 1976); *United States v. Wood Wire & Metal Lathers, Local 46,* 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939, 93 S. Ct. 2773, 37 L. Ed.2d 398 (1973).

federal government certainly has a compelling interest in resolving.

2. *Effective yet narrowly drawn means.* The critical question therefore becomes whether Congress adopted the least discriminatory method of accomplishing its concededly legitimate objective. In this regard, plaintiffs urge that the defendants could achieve the apparent purpose of Congress, with less imposition on nonminority persons, through greater use of (1) cash advances to minority contractors pursuant to 41 C.F.R. §1—30.400 *et seq.* (1977), and (2) section 8(a) of the Small Business Act, 15 U.S.C. §637(a), under which government procurement contracts are let to the Small Business Administration and are then fulfilled through noncompetitive subcontracts to "small business concerns owned and controlled by socially or economically disadvantaged persons." *See* 13 C.F.R. §124.8—1(b) (1977). Plaintiffs further contend that a set-aside for all disadvantaged enterprises would be a less onerous method of remedying the problem of prior racial discrimination. The record presently before this Court establishes, however, that the section 8(a) program has not been an effective remedy. *See* Minorities and Women as Government Contractors, *supra,* at 35—62. And the record further demonstrates that programs designed to provide minority businesses with additional capital through loans or advances are incapable of making them full participants in our economy since construction contractors clearly perfer to deal with firms that have an established track record. *See* Transcript at 18, 51. Yet without mandated opportunities to participate in large scale construction contracts, minority businesses are not in a position to develop such credentials and, therefore, are not likely to garner a greater share of government contracts. As one of the witnesses at trial put it:

> "It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if

> they don't have an established track record. They can not [*sic*] establish a track record if they don't get a chance to perform.

Transcript at 82. Expanding the set-aside to include all economically disadvantaged groups is also no answer to the problem, for in our present economy all construction firms are economically disadvantaged and redefining the set-aside to include them all would consequently be tantamount to striking it from the legislation entirely.

Plaintiffs make the further argument that any MBE requirement should be limited to a percentage "commensurate with the present minority participation in the economy." Plaintiffs' Post-Trial Memorandum at 15. The basis for this contention is apparently that the United States Commission of Civil Rights has only set the following goal for the federal government:

> Within the next 5 years, the Federal Government should increase the annual dollar volume of its contracts and subcontracts with minority males, minority females and nonminority, female-owned firms to an amount at least equal to their representation in all American businesses. Minorities and Women as Government Contractors, *supra,* at 129.

It is not clear whether plaintiffs would want the MBE requirement reduced to a tenth of its present scope to reflect more accurately the degree to which minority businesses actually participate in the United States economy or would be content merely to have it halved to approximate the percentage of minority enterprises that presently exist; nevertheless, the suggestion is absurd in either case.

In the first place, since the Act accounts for less than four percent of annual government contracting, the Commission's goal would not be met even if the MBE requirement were readjusted to require that 90 percent of all Act funds be spent through subcontracts with minority enterprises. Secondly, as Judge Snyder noted in *Constructors Association of Western Pennsylvania v. Kreps:*

> [T]he 10% figure is a reasonable one. Although the minority population is about 17%, the 10% figure is justifiably below that percentage, given their 1% past participation in the construction industry, and is not a concealed limitation on them. Since the program is short-term, there is no danger that the 10% requirement would become in practice a limitation of 10% once minority businesses have become established and competitive. On the other hand, the 10% requirement applies only to the extent local projects are funded by grants under [the Act] and is not overly intrusive on non-minorities. It is not a requirement that projects receiving federal funds assure that 10% of the *project* funds be given to minority businesses. Nor does it attempt to create an overall 10% requirement for the construction industry as a whole. These public works funds are intended to boost the construction industry by channeling extra funds into one aspect of the industry. A set-aside of 10% of these remedial funds for an additional remedial purpose is not unreasonable, especially given the availability of a waiver to the extent the 10% objective is unobtainable.

441 F.Supp. at 953.

Moreover, since the MBE requirement is subject to a December 31, 1978 cut-off date, Congress will have to

demonstrate continued compelling need in order for it to be extended beyond that time. Whether such need exists can then be determined through examination of readily available statistics, *id.*, at 953, including presumably updated Census Bureau data. *See* Survey of Minority-Owned Business Enterprises, *supra*, at 1.

Any reduction in the percentage of minority business participation required under the Act would, of course, result in reduced channeling of funds to the detriment of nonminority businesses and therefore less discriminatory impact. *See Ohio Contractors Association v. Economic Development Administration*, slip op. at 20. Nevertheless, the Court believes that requiring that 10 percent of all grant funds awarded under the Act be set aside for minority contractors or venders cannot be considered unreasonable in veiw of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises. The Court accordingly finds that the MBE requirement in its present form is necessary for the accomplishment of Congress' goal of promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry, and plaintiffs' first two causes of action are dismissed.

B. *The Statutory Question.*

[2] Plaintiffs raise a further claim that the MBE requirement violates various provisions of the Civil Rights Act of 1866 and 1964.[18] The Court does not believe, however, that there is any inconsistency between the requirements imposed by virtue of the Civil Rights Acts and the course of conduct mandated by the MBE requirement. *See Constructors Association of Western Pennsylvania v. Kreps*, at 954. Indeed, it

18. 42 U.S.C. §§1981, 1983 and 1985 (1970); 42 U.S.C. §§2000d and 2000e *et seq.* (1970).

defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173—74 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S. Ct. 98, 30 L.Ed.2d 95 (1971). Even more importantly, the host of cases permitting racially sensitive remedies for prior discriminatory acts totally belies plaintiffs' argument. *See, e. g., United Jewish Organizations v. Carey*, 430 U.S. 144, 161, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *Associated General Contractors of Massachusetts v. Altshuler*, 490 F.2d 9, 16—17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (and cases cited therein). As the Court of Appeals for the Second Circuit has observed, racial classification is frequently impermissible not because it is a per se violation of the Constitution, but because it has been drawn for the purpose of maintaining racial inequality. Where, on the other hand, it is employed to effect equality, it is clearly proper. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931—32 (1968). It may well be that the Supreme Court's impending decision in the *Bakke* case[19] will necessitate some reevaluation of "reverse discrimination" actions such as this one, but it is not the role of this Court to follow the law as superior tribunals might delineate it at some time in the future. The Court therefore holds that the MBE requirement accords with the intent of the Civil Rights Acts and rejects plaintiffs' statutorily-based contentions.

19. *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S. Ct. 1098, 51 L. Ed.2d 535 (1977).

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

SUMMARY

In conclusion, the court holds that defendants have sustained their burden of establishing the constitutionality of the MBE requirement. Plaintiffs' request for a preliminary injunction and declaratory relief is denied, the Secretary of Commerce's motion for a directed verdict is granted and the complaint is dismissed in its entirety.

SO ORDERED.

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 22, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 894—September Term, 1977.

(Argued May 24, 1978 Decided September 22, 1978.)

Docket No. 78-6011

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs-Appellants,

—v.—

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITALS CORPORATION,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge,* and
BLUMENFELD* and MEHRTENS,** *District Judges.*

* Senior United States District Judge for the District of Connecticut, sitting by designation.

** Senior United States District Judge for the Southern District of Florida, sitting by designation.

This is an appeal from an order of the United States District Court for the Southern District of New York, Werker, *J.*, denying plaintiffs' application for a preliminary injunction restraining the defendants from implementing a federal statute requiring that 10 percent of all federal funds appropriated for specified public works projects be expended on bids tendered by minority business enterprises, and dismissing the action.

Affirmed.

ROBERT G. BENISCH (Berman, Paley, Goldstein & Berman, New York, N.Y.); Robert J. Fink, of counsel (French, Fink, Markle & McCallion, New York, N.Y.); Richard L. O'Hara, Robert A. Kennedy, Robert J. Aurigema, William M. Savino, Stephen J. Smirti, Jr., of counsel (Doran, Colleran, O'Hara & Dunne, Garden City, N.Y.), on the brief, *for Plaintiffs-Appellants.*

ROBERT B. FISKE, JR., United States Attorney, New York, N.Y. (Gaines Gwathmey, III, Dennison Young, Jr., Mary C. Daly, Patrick H. Barth, Assistant United States Attorneys, of counsel); Drew S. Days, III, Assistant Attorney General, Civil Rights Div., U.S. Dept. of Justice (Vincent F. O'Rourke, Jr., Jessica Dunsay Silver, of counsel), *for Defendant-Appellee Kreps.*

DOMINICK J. TUMINARO, Assistant Attorney General of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Attorney General, George D. Zuckerman, Assistant Attorney General in charge of Civil Rights Bureau; Arnold D. Fleischer, Assistant Attorney General, of counsel), *for Defendant-Appellee State of New York.*

BLUMENFELD, *District Judge:*

This is an appeal from the decision of the District Court, Werker, *J.*, that upheld the constitutionality of section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. § 6705(f)(2). The statute mandates that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." "Minority business enterprise" (MBE) is defined as "a business at least 50 per centum of which is owned by minority group members . . . ." The statute defines minority group members in racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

Appellants are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. Their application for a preliminary injunction on their petition for declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the MBE provision was consolidated with a hearing on the merits. The District Court found that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry. The District Court denied their petition and dismissed the complaint. We affirm.

I.

In 1976 Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369 (July 22, 1976), 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735, designed to help alleviate nationwide unemployment in the economically depressed construction industry by appropriating $2 billion for public works projects. The Secretary of Commerce was to administer the program through the Economic Development Administration (EDA), charged with distributing funds under the Act to state and local governments. Congress mandated that the program be administered expeditiously[1] and the Secretary approved grants for the entire appropriation by February 1977. In May 1977, Congress supplemented the initial appropriation through the Public Works Employment Act of 1977, Pub. L. No. 95-28 (May 13, 1977), 91 Stat. 116-121, 42 U.S.C. §§ 6701-6736, to the extent of an additional $4 billion.

During the consideration of the PWEA on the floor of the House, the MBE requirement was introduced as an amendment to the Act. As contained in the final enactment, the provision reads:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

1 The Act required that each eligible project be started within 90 days of EDA approval (42 U.S.C. § 6705(d)), any application that was not rejected within 60 days of its submission to EDA would be deemed approved (42 U.S.C. § 6706), and the EDA was ordered to promulgate regulations governing grant applications within 30 days of the Act's passage (42 U.S.C. § 6706). The Act became law on May 24, 1977 and funds allocated under the PWEA had to be committed to an approved state or local project by September 30, 1977.

The appellants' attack is aimed only at the amendment; they do not contend that the inclusion of the amendment rendered the entire statute unconstitutional.

The question presented in this appeal is a narrow one. We are called upon to decide whether Congress acted in a constitutionally permissible manner in conditioning the receipt of federal grants for local public works projects under the PWEA upon the requirement that 10 percent of the grants be allocated to minority business enterprises.

II.

At the outset we note that when Congress seeks to exercise its spending powers, it is required to distribute federal funds in a manner that neither violates the equal protection rights of any group nor continues the effects of violations that have occurred in the past, for

> "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

Lau v. *Nichols*, 414 U.S. 563, 569 (1974), *quoting* 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

The Secretary acknowledges that in enacting the MBE provision Congress created an explicitly race-based condition on the receipt of PWEA funds. Under modern equal protection standards,[2] racial classifications are "suspect." This denomination often triggers the highest level of scrutiny imposed by the courts. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Usually when a classification turns upon an individual's racial or ethnic background, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4904 (U.S. June 28, 1978) (opinion of Powell, J.); *In re Griffiths*, 413 U.S. 717 (1973). Whether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race is a question we need not reach, for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster.[3]

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2 Although the Equal Protection Clause appears only in the fourteenth amendment, which applies only to the states, the Supreme Court has held that the equal protection principles of the fourteenth amendment are embodied in the Due Process Clause of the fifth amendment. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 99-100 (1976); Washington v. Davis, 426 U.S. 229, 239 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

3 Four Justices of the Supreme Court have indicated that an intermediate standard of scrutiny is sufficient when Government "acts not to demean or to insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area." *Bakke*, *supra*, 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Blackmun, JJ.) and *see id.* at 4920-21. Mr. Justice Powell, however, rejected that view and the other four Justices did not reach the question.

III.

The principles which the court below applied in rejecting the appellants' contentions that the amendment was either unconstitutional or in violation of the Civil Rights Act of 1964 are not in dispute on this appeal. However, we restate them briefly in order to put the appellants' argument that they were misapplied by the trial judge into sharper focus.

The appellants agree that the district judge correctly decided that "strict scrutiny" was required, but they contend that the standard of review which such scrutiny requires was not correctly applied. Having conceded below and properly so, that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," they advance two separate arguments that a compelling interest was not shown.

Their argument is that there was not an adequate basis for the court below to conclude that Congress' purpose was to remedy prior wrongs to minority groups who had been denied opportunities in the construction industry as a result of race discrimination. This proposition has two elements that are analytically distinct. That they are treated in combination is understandable for they are bound together and rest to some extent on the same history and policy considerations. The amendment is permissible only if it is a remedy for past discrimination. *See Regents of the University of California* v. *Bakke*, *supra*, 46 U.S.L.W. at 4905 (opinion of Powell, J.). Whether it was Congress' *purpose* to enact a remedy for past discrimination is one question. Whether such discrimination occurred in the past is another question. The second question depends upon an assessment of historical facts, the first upon what was in the mind of Congress.

A. *Congress' Purpose*

Congressional purpose is relevant to consideration of whether the classification is permissible. Under any equal protection test "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).[4] More recently in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), the Court said that even if strict judicial scrutiny was not required, the statute "must still be examined to determine whether it rationally furthers some legitimate, articulated[5] state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *See also* L. Tribe, *American Constitutional Law* § 16-30 at 1083-85 (1978); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20-22 (1972). Since strict scrutiny should require no less, we turn our attention to whether Congress articulated its purpose in enacting the amendment.

The rule for ascertaining what the purpose of Congress was in enacting a statute that is subject to scrutiny under

4 The notion that any conceivable purpose which would uphold a classification should be attributed to it, *e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), allows for more judicial restraint than strict scrutiny permits. In *McGowan* the Court stated that the Equal Protection Clause is violated only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective—a statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it.

5 Since no content was given to the word "articulated," we view it as a prophylactic against resort to the "any conceivable reason" justification of *McGowan*. See note 4 *supra*.

the Equal Protection Clause is more deferential than the rule which would be applied to test a state statute. In differentiating a law passed by Congress from a mandate by a state legislature, or an administrative agency, the Court has said, "Alternatively if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976). That a large measure of judicial restraint must be accorded to Congress in its enactment of legislation to remedy past discrimination was affirmed recently in *Regents of the University of California* v *Bakke, supra*, 46 U.S.L.W. at 4905 n.41 (opinion of Powell, J.):

> "[W]e are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer*, 392 U.S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."

Judge Werker did not base his decision that it was the purpose of Congress to remedy past discrimination solely on a presumption. There is no need to rely solely on a bare presumption to determine the purpose of Congress. The classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors.[6] It has been

6 The appellants argue that the legislative history is silent with respect to any purpose to remedy the effect of past discrimination, and

suggested that "[i]f an objective can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary." Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1077 (1969). It is also beyond dispute that the set-aside was intended to remedy past discrimination. To support that conclusion, it is "enough that [the court] perceive a basis upon which Congress might predicate a judgment that" the MBE amendment would remedy past discrimination against minority construction businesses. *See Katzenbach* v. *Morgan, supra,* 384 U.S. at 656. In view of the comprehensive legislation which Congress has enacted during the past decade and a half for the benefit of those minorities who have been victims of past discrimination,[7] any purpose Congress might have had

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shows only that $4 billion which Congress allocated under the PWEA was expected to generate 300,000 jobs in other industries. But, by that particular amendment (§ 103(f)(2)), injected in the Act from the floor during the course of the debate, Congress did not create more jobs. It is clear from the amendment that Congress intended to guarantee that part of the jobs already contemplated by the PWEA would go to minority businesses, and not, as the plaintiffs contend, to "disadvantaged as opposed to minority small businesses."

7 For example, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6); Pub. L. No. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17); Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9); Pub. L. No. 93-608, § 3(1), 88 Stat. 1972 (codified at 42 U.S.C. § 2000e-4); Pub. L. No. 94-273, § 3(24), 90 Stat. 377 (codified at 42 U.S.C. § 2000e-14); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Pub. L. No. 90-284, title I, § 103(c), 82 Stat. 75; Pub. L. No. 91-285, §§ 3-6, 84 Stat. 315; Pub. L. No. 91-405, title II, § 204(e), 84 Stat. 853; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, title II, §§ 204, 206, title IX, § 405, 89 Stat. 402, 404 (codified at 42 U.S.C. § 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified at 18 U.S.C. §§ 231-233, 241, 242, 245, 1153, 2101, 2102; 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-

other than to remedy the effects of past discrimination is difficult to imagine.

B. *Past Discrimination*

Although Congress' purpose and the factual background from which it sprang are not so disjoined that they could not be considered together, Judge Werker considered the question of past discrimination separately. The comprehensive opinion of the District Judge to which we make reference considered remarks made on the floor of the House when the MBE provision was introduced during the debate on the PWEA. He noted that Representative Mitchell, the amendment's sponsor, criticized the federal program of assistance to minority businesses that permits them to become "viable entities in our system" only to be "cut off" when government contracts are awarded. See Joint App. 160a; 123 Cong. Rec. H. 1437 (daily ed. Feb. 24, 1977), *reprinted in Associated General Contractors* v. *Secretary of Commerce,* 441 F. Supp. 955, 997-1006 (C.D. Cal. 1977) (Appendix C). In concluding that Congress found past discrimination, he also properly relied upon remarks made by Representative John Conyers of New York. Speaking in favor of the amendment, the Representative observed that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time.*" *Id.* (emphasis added). Those remarks clearly disclosed the connection between the past discrimination and the "set-aside" amendment, and powerfully reinforced the conclusion reached by the judge.[8]

1326, 1331, 1341; 28 U.S.C. § 1360 nts.; 42 U.S.C. §§ 1973j; 3533, 3535, 3601-3619, 3631); Pub. L. No. 93-265, 88 Stat. 84 (codified at 25 U.S.C. § 1341).

8 Statements made in debates may be regarded as authoritative indicia of congressional intent. Pan American World Airways, Inc. v. CAB,

That an explicit finding of past discrimination was not included in the committee reports may sometimes be "troublesome." *Constructors Association* v. *Kreps*, 441 F. Supp. 936, 952 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978).[9] In this case it is not surprising in view of the manner in which the amendment was introduced.[10] But the absence of such a finding in the reports is not determinative. The record that was considered provided sufficient justification for a finding of past discrimination. *Cf. Arizona* v. *Washington*, 46 U.S.L.W. 4127, 4132 (U.S. Feb. 26, 1978) (when record provides sufficient justification for trial judge's mistrial ruling, ruling not subject to collateral attack simply because judge failed to make explicit finding of "manifest necessity" for mistrial). The record may be sparse, but it is not entirely silent.

The judge quite properly took account of the data and observations contained in a report prepared by the Department of Commerce to evaluate existing opportunities for minority business. See U.S. Dept. of Commerce, Office of

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380 F.2d 770, 782 (2d Cir. 1967). The situation here was similar to that in United States v. Oates, 560 F.2d 45, 72 (2d Cir. 1977), where the court said: "It is, of course of critical importance that it was with the explanations of [the Representative who sponsored the amendment] freshly in mind that the full House of Representatives on the very day these remarks were uttered finally approved" the bill. The MBE amendment was considered and passed by the House on February 24, 1977, the date these statements were made on the floor. H.R. Rep. No. 95-20, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 150. The remarks were much more extensive but were all to the same effect.

9 Judge Snyder in Constructors Ass'n v. Kreps, *supra*, found the same passage sufficient evidence that Congress enacted the MBE provision to remedy past discrimination in the construction industry.

10 This explains the absence of any mention of the amendment in the Committee reports. Furthermore, the lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry.

Minority Business Enterprise, *Minority Business Opportunity Handbook* (August 1976). Noting plaintiffs' objection to the soundness of the data contained in the report, the Judge found "even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to conclude that 'the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical *exclusion* from the mainstream economy.'" Joint App. 161a quoting from the *Minority Handbook* at 1-1-2 (court's emphasis included).

Moreover the judge undertook consideration of evidence that Congress had recorded elsewhere to support its finding that the history of discrimination was specific to the construction industry. A report prepared by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise contains the following statement:

> "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular*. However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them."

Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, at 182-83 (November 1976) (emphasis added). The judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record and establishes a "perceived" basis for congressional action.

IV.

In employment discrimination cases it is well established that the government's interest in overcoming the disadvantages resulting from past discrimination in employment on account of race is sufficiently compelling to justify a remedy which requires the use of racial preferences.[11] The vitality of the rationale in those cases has not disturbed by the recent decision of the Court in *Regents of the University of California* v. *Bakke, supra.* The Justices did not disagree with the principle that race-conscious remedies can be imposed when there have been judicial, legislative or administrative findings of past discrimination and the remedies fashioned are appropriately drawn to rectify that

11 Many of those cases are cited by Chief Judge Coffin in support of a decision upholding that principle in Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16-17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), along with Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 954 (1971), which is cited with approval in *Bakke*, 46 U.S.L.W. at 4905.

Section 6705(f)(2) merely broadens the economic area in which that principle applies to include independent contractors in the construction industry. We do not attempt to draw any distinction between services and materials which might be furnished by independent subcontractors on construction jobs. We note, however, that a person conducting a minority business who is denied an opportunity to compete for a certain amount of business on account of his race would have a cause of action under 42 U.S.C. § 1981. Runyon v. McCrary, 427 U.S. 160 (1976); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496, 499-500 (D. Conn. 1978).

discrimination. *Id.*, 46 U.S.L.W. at 4905 & n.41 (opinion of Powell, J.).[12]

In affirmative action programs to remedy the effects of past discrimination the effect of preferring members of the injured groups at the expense of others must be considered. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), Mr. Justice Powell, at 784-86 (concurring & dissenting), warned that affirmative action ordered as equitable relief must not exceed the bounds of fundamental fairness. *See Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976). It is established that in fashioning remedies for past discrimination courts must be sensitive to interests which may be adversely affected by the remedy. The courts, here, as in a number of other areas where legislation for which there is a compelling interest collides with constitutional principles, have adopted an ad hoc balancing test which examines each particular case, *e.g.*, *Branzburg* v. *Hayes*,

12 As Mr. Justice Powell noted:

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* [v. *Carey*, 430 U.S. 144, 155-156 (1977)]; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1960). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

Regents of the Univ. of Cal. v. Bakke, *supra*, 46 U.S.L.W. at 4906-07 (footnote omitted).

408 U.S. 665 (1972) (public interest in law enforcement outweighs reporters' first and fourteenth amendment interest in keeping news sources confidential). One of the significant limitations on a remedy of "reverse discrimination" for past discrimination is that its effects shall "not be 'identifiable,' that is to say, concentrated upon a small ascertainable group of non-minority persons." *EEOC* v. *Local 638 . . . Local 28, Sheet Metal Workers,* 532 F.2d 821, 828 (2d Cir. 1976). *See also Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976). The amendment at issue falls well within such a boundary against inequitable results. The PWEA which added $4 billion to the $200 million not yet expended portion of the amount authorized by Round I (Local Public Works Act) amounted to about 2,5 percent of the total of nearly $170 billion spent on construction in the United States for 1977, according to Department of Commerce statistics.[13] The set-aside for minority contractors under the PWEA was for 10 percent of the total grant and thus extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of these appellants, who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry.[14]

13 U.S. Dept. of Commerce, Industry and Trade Administration, *Construction Review,* May-June 1978, at 11.

14 U.S. Bureau of the Census, *1972 Census of Construction Industries: Industries Series, United States Summary—Statistics for Construction*

Considering that nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

Ours is not the only circuit in which the MBE amendment's constitutionality has been challenged by associations of general contractors. Other cases that have denied preliminary injunctions against enforcement of the "set-aside" provision are *Rhode Island Chapter, Associated General Contractors* v. *Kreps,* No. 77-0676 (D.R.I. Feb. 6, 1978); *Associated General Contractors* v. *Secretary of Commerce,* No. 77-4218 (D. Kan. Dec. 19, 1977); *Carolinas Branch, Associated General Contractors* v. *Kreps,* 442 F. Supp. 392 (D.S.C. 1977); *Ohio Contractors Association* v. *Economic Development Administration,* No. C-1-77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association* v. *Kreps,* 439 F. Supp. 1331 (D. Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce,* No. 77-8351 (S.D. Fla. Nov. 3, 1977). *But see Associated General Contractors* v. *Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded,* 46 U.S.L.W. 3802 (U.S. July 3, 1978), which held the provision invalid.[15] That case reached

Establishments With and Without Payrolls, Table A 1 (Aug. 1975); U.S. Bureau of the Census, *1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses,* Table 1 (May 1975).

15 In Associated Gen. Contractors v. Secretary of Commerce, *supra,* the court held that § 103(*f*)(2) of the PWEA is inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1. The trouble with that conclusion is that it is based on the overbroad premise that *any* reverse discrimination in a remedy for past discrimination is prohibited *per se* by Title VI. A majority of the Supreme Court has held that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." Regents of the Univ. of Cal. v. Bakke, *supra,* 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Black-

the Supreme Court where it was remanded to the District Court for consideration of mootness. *See also Wright Farms Construction, Inc.* v. *Kreps*, No. 77-260 (D. Vt. Dec. 23, 1977).[16]

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mun, JJ.); *id.* at 4901 (opinion of Powell, J.). As we have shown above, a remedy for the effects of past discrimination which results in a not unreasonable amount of reverse discrimination is not unconstitutional. *See, e.g.*, Franks v. Bowman Transportation Co., *supra*. *See also* Acha v. Beame, *supra*; United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). The effect here is minimal when compared with Rios v. Enterprise Ass'n Steamfitters Local Union 638, 501 F.2d 622 (2d Cir. 1974), which upheld an order to a union to admit minority applicants to an apprenticeship program in sufficient numbers to achieve a goal of 30 percent nonwhite membership.

16 In Wright Farms Constr., Inc. v. Kreps, *supra*, the court made a specific finding that Vermont had a small minority population, and therefore held the MBE provision unconstitutional as applied to contractors in that state. However, Congress clearly manifested its intent that the set-aside provision should not apply in such a case. See 123 Cong. Rec. 1437 (daily ed. Feb. 24, 1977), *reprinted* in Associated Gen. Contractors v. Secretary of Commerce, *supra*, 441 F. Supp. at 998-99 (Appendix C), where Representative Mitchell, the sponsor of the amendment, engaged in the following colloquy with Representative Kazen:

"Mr. Kazen: All right. What happens in the rural areas where there are no minority enterprises? Will the 10 percent be held up in order to bring minority enterprises from somewhere else where there is no unemployment into a place where there is unemployment and there is no minority enterprise?

"Mr. Mitchell of Maryland: In response to the gentleman's question, the answer is 'No.'

" . . .

" . . . Let me tell the gentleman why that would not occur. When Presidents Nixon and Ford put out their Executive orders to all the agencies to utilize minority contractors, the agencies then established certain guidelines which said, all right, we will utilize these minority contractors wherever possible, but where there are none, there can be no utilization, and therefore no project should be delayed.

"For example, I would not expect to take my minority contractors from Maryland into Idaho to meet that State's requirement. That will not be an issue.

"Mr. Kazen: If the gentleman would yield further, this is what I wanted the gentleman to clarify, that where there are no minority enterprise contractors [then] this provision would not be in effect; am I correct?

"Mr. Mitchell of Maryland: That is absolutely correct, and that is done by administrative action already on the books with all of the agencies.

"Mr. Kazen: Does the gentleman's amendment leave room for that type of discretion in the Secretary?

"Mr. Mitchell of Maryland: I assume that it does. It would be my intent that it would because that is existing administrative law."

As Representative Mitchell amplified further, 123 Cong. Rec. 1438, *reprinted* in 441 F. Supp. at 1000:

" . . . I reiterate what I said earlier, that we already have in existence within the agency structure the SOP administrative law that says this kind of amendment would not apply where there are no minority contractors or where there are no minorities. It is already in the law."

Both the Third and the Sixth Circuits have upheld the constitutionality of the MBE amendment. *Constructors Association* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, —— F.2d ——, No. 78-3053 (6th Cir. July 7, 1978). We agree with their decisions that section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), is not unconstitutional.

The judgment is affirmed.

PUBLIC WORKS EMPLOYMENT ACT OF 1977

CHAPTER 80—PUBLIC WORKS EMPLOYMENT

SUBCHAPTER II—ANTIRECESSION PROVISIONS

Sec.
6726. Authorization of appropriations for Puerto Rico, Guam, American Samoa, and Virgin Islands [New].

(a) Authorizations for five calendar quarters beginning July 1, 1977.
(b) Allocations.
(c) Payments to local governments.

SUBCHAPTER I—LOCAL PUBLIC WORKS

§ 6701. Definitions

As used in this subchapter, the term—

(1) "Secretary" means the Secretary of Commerce, acting through the Economic Development Administration.

(2) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(3) "local government" means any city, county, town, parish, or other political subdivision of a State, and any Indian tribe.

(4) "public works project" includes a project for the transportation and provision of water to a drought-stricken area.

As amended Pub.L. 95–28, Title I, § 102, May 13, 1977, 91 Stat. 116.

1977 Amendment. Par. (2). Pub.L. 95-28, § 102(a), added reference to the Trust Territory of the Pacific Islands.

Par. (4). Pub.L. 95-28, § 102(b), added par. (4).

Short Title of 1977 Amendment. Section 101 of Pub.L. 95-28 provided that: "This title [amending this section and sections 6702, 6703, 6707, 6708, and 6710 of this title and enacting provisions set out as notes under this section] may be cited as the 'Public Works Employment Act of 1977'."

Public Works Investment Study; Preliminary Report; Final Report Within 30 Months After May 13, 1977. Section 110 of Pub.L. 95-28 provided that:

"The Secretary of Commerce is authorized and directed to study public works investment in the United States and the implications for the future of recent trends in such investment.

"(b) The study authorized by this section shall include, but not be limited to, the following:

"(1) The historical scope and nature of public works investment, including—

"(A) shifts in the types of public facilities constructed over the last thirty years and the implications of such shifts;

"(B) the patterns of regional distribution of investment;

"(C) the role of the Federal Government, States and local communities in funding public facilities;

"(D) the impact upon unemployment in minority groups.

"(2) The proportion of the gross national product devoted to public works investment over the last thirty years.

"(3) Methods by which the aggregate need for public works can be determined.

"(4) How public works are financed and how financing arrangements affect the pattern and type of investment.

"(5) The level of maintenance or renovation of existing public facilities needed, compared to that provided.

"(c) The Secretary of Commerce shall submit to Congress a report with respect to its findings and recommendations no later than eighteen months after the date of enactment of this section [May 13, 1977]. A preliminary report putting forth the study design shall be submitted to Congress within four months after the date of enactment of this section [May 13, 1977]."

42 § 6705 PUBLIC HEALTH AND WELFARE

§ 6705. Limitations on use of grants

[See main volume for text of (a) to (d)]

Performance of projects by State or local governments prohibited; competitive bidding; illegal aliens

(e)(1) No part of the construction (including demolition and other site preparation activities), renovation, repair, or other improvement of any public works project for which a grant is made under this chapter after May 13, 1977, shall be performed directly by any department, agency, or instrumentality of any State or local government. Construction of each such project shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) No grant shall be made under this chapter for any local public works project unless the State or local government applying for such grant submits with its application a certification acceptable to the Secretary that no contract will be awarded in connection with such project to any bidder who will employ on such project any alien in the United States in violation of the Immigration and Nationality Act or any other law, convention, or treaty of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens.

Use of products made in the United States; minority business enterprises

(f)(1)(A) Notwithstanding any other provision of law, no grant shall be made under this chapter for any local public works project unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States, will be used in such project.

(B) Subparagraph (A) of this paragraph shall not apply in any case where the Secretary determines it to be inconsistent with the public interest, or the cost to be unreasonable, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term

"minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Accessibility standards for handicapped and elderly

(g) No grant shall be made under this chapter for any project for which the applicant does not give assurances satisfactory to the Secretary that the project will be designed and constructed in accordance with the standards for accessibility for public buildings and facilities to the handicapped and elderly under the Act entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved August 12, 1968. The Architectural and Transportation Barriers Compliance Board established by the Rehabilitation Act of 1973 is authorized to insure that any construction and renovation done pursuant to any grant made under this chapter complies with the accessibility standards for public buildings and facilities issued under the Act of August 12, 1968.
As amended Pub.L. 95–28, Title I, § 103, May 13, 1977, 91 Stat. 116.

References in Text. The Immigration and Nationality Act, referred to in subsec. (e)(2), is Act June 27, 1952, c. 477, 66 Stat. 163, which is classified to section 1101 et seq. of Title 8, Aliens and Nationality.

The Act of August 12, 1968, entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", referred to in subsec. (g), is Pub.L. 90-480, Aug. 12, 1968, 82 Stat. 718, which is classified to section 4151 et seq. of this title.

The Architectural and Transportation Barriers Compliance Board established by the Rehabilitation Act of 1973, referred to in subsec. (g), was established under section 502 of that Act (Pub.L. 93-112, Title V, § 502, Sept. 26, 1973, 87 Stat. 391) which is classified to section 792 of Title 29, Labor.

1977 Amendment. Subsecs. (e)–(g). Pub.L. 95-32 added subsecs. (e) to (g).

§ 6705. Implementing rules, regulations, and procedures; criteria; employment of disabled and Vietnam-era veterans; determination of applications for grants

The Secretary shall, not later than thirty days after July 22, 1976, prescribe those rules, regulations, and procedures (including application forms) necessary to carry out this chapter. Such rules, regulations, and procedures shall assure that adequate consideration is given to the relative needs of various sections of the country. The Secretary shall consider among other factors (1) the severity and duration of unemployment in proposed project areas, (2) the income levels and extent of underemployment in proposed project area, and (3) the extent to which proposed projects will contribute to the reduction of unemployment. The Secretary, in consultation with the Secretary of Labor, and consistent with existing applicable collective bargaining agreements and practices, shall promulgate regulations to assure special consideration to the employment in projects under this chapter of qualified disabled veterans (as defined in section 2011(1) of Title 38) and qualified Vietnam-era veterans (as defined in section 2011(2)(A) of such Title 38). The Secretary shall make a final determination with respect to each application for a grant submitted to him under this chapter not later than the sixtieth day after the date he receives such application. Failure to make such final determination within such period shall be deemed to be an approval by the Secretary of the grant requested. For purposes of this section, in considering the extent of unemployment or underemployment, the Secretary shall consider the amount of unemployment or underemployment in the construction and construction-related industries.
As amended Pub.L. 95–28, Title I, § 104, May 13, 1977, 91 Stat. 117.

1977 Amendment. Pub.L. 95-28 directed the Secretary to promulgate regulations to assure special consideration to the employment in projects of qualified disabled veterans and qualified Vietnam-era veterans.

§ 6707. Priority and amounts of projects

Allocation of appropriated funds; Indian tribes and Alaska Native villages; prior applications; unemployment ratio; limits on grants for any one State; territories

(a) The Secretary shall allocate funds appropriated after May 13, 1977, under section 6710 of this title as follows:

(1) 2½ per centum of such funds shall be set aside and shall be expended only for grants for public works projects under this chapter to Indian tribes and Alaska Native villages. None of the remainder of such funds shall be expended for such grants to such tribes and villages.

(2) After the set aside required by paragraph (1) of this subsection, $70,000,000 shall be set aside and expended only for grants for any public works project the application for a grant for which was made under this chapter after July 22, 1976, and before December 24, 1976, and which application was not received, was not considered, or was rejected solely because of an error by an officer or employee of the United States. Any allocation made to an applicant pursuant to regulation shall be reduced by the amount of any grant made to such applicant under this paragraph.

(3) After the set asides required by paragraphs (1) and (2) of this subsection, 65 per centum of such funds shall be allocated among the States on the basis of the ratio that the number of unemployed persons in each State bears to the total number of unemployed persons in all the States and 35 per centum of such funds shall be allocated among those States with an average unemployment rate for the preceding twelve-month period in excess of 6.5 per centum on the basis of the relative severity of unemployment in each such State, except that (A) no State shall be allocated less than three-quarters of one per centum or more than 12½ per centum of such funds for local public works projects within such State, except that in the case of Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands, not less than one-half of one per centum in the aggregate shall be granted for such projects in all four of these jurisdictions, and (B) no State whose unemployment data was converted for the first time in 1976 to the benchmark data of the current population survey annual average compiled by the Bureau of Labor Statistics shall receive a percentage of such funds less than the percentage of funds allocated to such State under this chapter from funds appropriated to carry out this chapter prior to May 13, 1977.

Local government projects; energy conservation; endorsement of project by general purpose local government; projects requested by school districts

(b)(1) In making grants under this chapter, the Secretary shall give priority and preference to public works projects of local governments.

(2) In making grants for projects for construction, renovation, repair, or other improvement of buildings, the Secretary shall also give consideration as between such building projects to those projects which will result in conserving energy, including, but not limited to, projects to redesign and retrofit existing public facilities for energy conservation purposes, and projects using alternative energy systems.

(3) In making grants under this chapter, the Secretary shall also give priority and preference to any public works project requested by a State or by a special purpose unit of local government which is endorsed by a general purpose local government within such State.

(4) A project requested by a school district shall be accorded the full priority and preference to public works projects of local governments provided in paragraph (1).

Unemployment rates; priority; States receiving minimum allocations

(c) In making grants under this chapter, if for the twelve most recent consecutive months, the national unemployment rate is equal to or exceeds 6½ per centum, the Secretary shall (1) expedite and give priority to applications submitted by States or local governments having unemployment rates for the twelve most recent consecutive months in excess of the national unemployment rate and (2) shall give priority thereafter to applications submitted by States or local governments having unemployment rates for the twelve most recent consecutive months in excess of 6½ per centum, but less than the national unemployment rate. Information regarding unemployment rates may be furnished either by the Federal Government, or by States or local governments, provided the Secretary determines that the unemployment rates furnished by States or local governments are accurate, and shall provide assistance to States or local governments in the calculation of such rates to insure validity and standardization. The Secretary may waive the application of the first sentence of this subsection to any State which receives a minimum allocation pursuant to paragraph (3) of subsection (a) of this section.

Priorities for projects in State or localities with two or more projects

(d) Whenever a State or local government submits applications for grants under this chapter for two or more projects, such State or local government shall submit as part of such applications its priority for each such project.

Community or neighborhood basis of unemployment rates

(e) The unemployment rate of a local government shall, for the purposes of this chapter, and upon request of the applicant, be based upon the unemployment rate of any community or neighborhood (defined without regard to political or other subdivisions or boundaries) within the jurisdiction of such local government, except that any grant made to a local government based upon the unemployment rate of a community or neighborhood within its jurisdiction must be for a project to be constructed in such community or neighborhood.

(f) Repealed. Pub.L. 95–28, Title I, § 107(e), May 13, 1977, 91 Stat. 119.

Criteria for requests

(g) States and local governments making application under this chapter should (1) relate their specific requests to existing approved plans and programs of a local community development or regional development nature so as to avoid harmful or costly inconsistencies or contradictions; and (2) where feasible, make requests which, although capable of early initiation, will promote or advance longer range plans and programs.

Applications not submitted on or before December 23, 1976; grants prohibited; exceptions

(h)(1) Except as provided in paragraph (2) of this subsection, the Secretary shall not consider or approve or make a grant for any project for which any application was not submitted for a grant under this chapter on or before December 23, 1976.

(2) The Secretary may receive applications for grants for projects under this chapter—

(A) from the Trust Territory of the Pacific Islands;

(B) from Indian tribes and Alaska Native villages;

(C) from any applicant to use any allocation which may be made pursuant to regulation, to the extent necessary to expend such allocation, if a sufficient number of applications were not submitted on or before December 23, 1976, to use such allocation.

Substitution of projects to alleviate drought or other emergency or disaster-related conditions or damage

(i) The Secretary may allow any applicant which has received a grant for a project under this chapter to substitute one or more projects for such project if in the judgment of the Secretary (1) the Federal cost in the aggregate of such substituted project or projects does not exceed such grant, (2) such substituted project or projects comply with section 6705 (d) of this title, and (3) such substituted project or projects will in fact aid in alleviating drought or other emergency or disaster-related conditions or damage. Section 6705(a) of this title shall not apply to projects substituted under this subsection.

Private nonprofit health care or rehabilitation facilities

(j) Notwithstanding subsection (h)(1) of this section, grants may be made from appropriations made under section 6710 of this title after September 30, 1977, to States or local governments for projects for the construction, renovation, repair, or other improvements of health care or rehabilitation facilities owned and operated by private nonprofit entities.

As amended Pub.L. 95–28, Title I, §§ 105–107, May 13, 1977, 91 Stat. 117, 118.

1977 Amendment. Subsec. (a). Pub.L. 95-28, § 105, added par. (1) and the introductory provisions preceding par. (1), par. (2), and, in par. (2), the introductory provisions preceding cl. (A) and cl. (B), designated existing provisions as cl. (A) of par. (2) and, in such cl. (A) as so designated added reference to the Trust Territory of the Pacific Islands and substituted "three-quarters of one percentum" for "one-half of one percentum" and "of such funds" for "of all amounts appropriated to carry out this subchapter".

Subsec. (b). Pub.L. 95-28, § 105, designated existing provisions as par. (1) and added pars. (2) to (4).

Subsec. (c). Pub.L. 95-28, § 107(a), (b), substituted "twelve most recent consecutive months" for "three most recent consecutive months" and authorized the Secretary to waive the application of the first sentence of the subsection to any State which receives a minimum allocation pursuant to subsec. (a)(3) of this section.

Subsec. (d). Pub.L. 95-28, § 107(c), substituted provisions directing State or local governments that submit two or more projects to submit as part of their applications the priorities assigned to each project for provisions directing that seventy percentum of all amounts appropriated to carry out this chapter be granted for public works projects submitted by State or local governments given priority under clause (1) of the first sentence of subsec. (c) of this section, with the remaining thirty percentum available for public works projects submitted by State or local governments in other classifications of priority.

Subsec. (e). Pub.L. 95-28, § 107(d), substituted "to be constructed in such community or neighborhood" for "of direct benefit to, or provide employment for, unemployed persons who are residents of that community or neighborhood".

Subsec. (f). Pub.L. 95-28, § 107(e), struck out subsec. (f) which directed that, in determining the unemployment rate of a local government for purposes of this section, the unemployment in those adjoining areas from which the labor force for such project might be drawn were to be taken into consideration.

Subsecs. (h)-(j). Pub.L. 95-28, § 107(f), added subsecs. (h) to (j).

§ 6708. Wage standards for laborers and mechanics; enforcement

All laborers and mechanics employed on projects assisted by the Secretary under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. The Secretary shall not extend any financial assistance under this chapter for such project without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this provision, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40.

As amended Pub.L. 95-28, Title I, § 108, May 13, 1977, 91 Stat. 119.

1977 Amendment. Pub.L. 95-28 substituted "All laborers and mechanics employed" for "All laborers and mechanics employed by contractors or subcontractors".

§ 6710. Authorization of appropriations

There is authorized to be appropriated not to exceed $6,000,000,000 for the period ending December 31, 1978, to carry out this chapter.

As amended Pub.L. 95-28, Title I, § 109, May 13, 1977, 91 Stat. 119.

1977 Amendment. Pub.L. 95-28 substituted "$6,000,000,000 for the period ending December 31, 1978" for "$2,000,000,000 for the period ending September 30, 1977".

Immediate Initiation of Construction on Certain Projects. Section 111 of Pub.L. 95-28 provided that: "The Secretary of Agriculture and the Secretary of the Interior shall immediately initiate the construction of those Federal public works projects (A) which are the responsibility of their respective departments, (B) which have been authorized, and (C) which can be commenced within 60 days of the date of enactment of this section [May 13, 1977] and completed no later than the 180th day after commencement of construction. No funds authorized by section 111 of the Local Public Works Capital Development and Investment Act of 1976 (Public Law 94-369) [this section] may be used to carry out this section."

APPENDIX

FILED
JUN 27 1979
MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1978
CERTIORARI GRANTED MAY 21, 1979

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DOCKET ENTRIES — UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, *FULLILOVE, H. EARL ET AL. v. KREPS, JUANITA ET AL.*

77 Civil 5786 — Judge Werker

Date	Proceedings
1-30-77	Filed complaint and issued summons.
1-30-77	Hearing begun and concluded on TRO — Denied. Hearing on Preliminary Injunction on 12-2-77 at 10 A.M.
1-30-77	Hearing begun 11-30-77 and concluded 12-2-77. To be submitted — Everything by 5 P.M. — 12-5-77. Judge's Decision Reserved.
12-5-77	Filed plaintiffs' post trial memorandum.
12-6-77	Filed defendants' affidavit in further support of Government's opposition to consolidation of the trial with the hearing on plaintiffs' motion for preliminary injunction or in the alternative in support of the Government's motion for continuance of such trial.
12-6-77	Filed defendant Kreps' post-hearing memo of law.
12-6-77	Filed affidavit of M.L. Banner of Civil Rights Div. of Atlantic Regional Office of the Economic Develop. Adm.
12-7-77	Filed defendant (City of N.Y.) memo of law in opposition to plaintiffs' motion for injunction and declaratory judgment.

Docket Entries — United States District Court, Southern District of New York

12-9-77	Filed defendant (Kreps) reply memorandum.
12-19-77	Filed letter to Judge Werker from Dep't of Justice dated 12-6-77.
12-20-77	Filed plaintiffs SCO with TRO. Ret. 12-2-77.
12-20-77	Filed plaintiffs' memo of law in support of application for a TRO and preliminary injunction.
12-20-77	Filed affidavit of Anthony J. Sulvetta.
12-20-77	Filed defendant N.Y. State memo of law in opposition to plaintiffs' motion for injunction and declaratory relief.
12-21-77	Filed MEMORANDUM DECISION #46692. The court holds that defendants have sustained their burden of establishing the constitutionality of the MBE requirement. Plaintiffs' request for a preliminary injunction and declaratory relief is denied, the Secretary of Commerce's motion for a directed verdict is granted and the complaint is dismissed in its entirety — Werker, J. m/n
12-28-77	Filed JUDGMENT AND ORDER that defendants have judgment against plaintiffs dismissing the complaint — Clerk m/n
1-13-78	Filed plaintiffs' notice of appeal to the USCA from the final order and judgment entered 12-19-77. Copies sent to:

Docket Entries — United States District Court, Southern District of New York

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DOCKET ENTRIES—UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *FULLILOVE, H. EARL ET AL. v. KREPS, JUANITA ET AL.*

78-6011

Date	Proceedings
1-23-78	Filed copies of docket entries and notice of appeal.
1-23-78	Received docket fee.
1-23-78	Robert Fink, Robert A. Kennedy and Robert G. Beniach filed Form p/s.
1-23-78	Robert Fink, Robert A. Kennedy and Robert G. Beniach filed Form p/s.
1-25-78	Filed scheduling order #1 (CAMP).
2-3-78	Filed motion for a preference and expedited appeal, appellants.
2-10-78	Filed scheduling order #2.
2-14-78	Filed record (Original papers of district court.)
2-17-78	Filed affidavit in opposition to motion to expedite appeal, appellee, pfs.
3-16-78	Filed brief, appellant, pfs.
3-16-78	Filed joint appendix, pfs.
3-16-78	Filed exhibit volumes, pfs, appellant (4cc).

Docket Entries — United States Court of Appeals for the Second Circuit

3-16-78	Filed opinion volume, pfs, appellant (4cc).
3-30-78	Filed scheduling order #3, CAMP.
4-17-78	Filed brief, appellee, p/s.
4-19-78	Filed brief, appellee (NYS) pfs.
4-26-78	Filed motion for leave to appear on behalf of Amici Curiae, the Anti-Defamation league of B'nai B'rith, the Mid-America Legal Foundation, and The Committee on Academic Nondiscrimination and Integrity.
5-2-78	Filed order granting motion for leave to file a brief amicus curiae on behalf of the Anti-Defamation League, etc.
5-2-78	Filed brief, amicus curiae (Anti-Defamation League, etc.), pfs.
5-4-78	Filed reply brief, appellant, pfs.
5-4-78	Filed first supplemental record (original papers of district court).
5-25-78	Argument heard (By: Oakes, CJ, Mehrtens, Blumenfeld, DJJ).
9-22-78	Judgment affirmed: (Blumenfeld, D.J.).
9-22-78	Filed judgment.
10-3-78	Filed itemized and verified bill of costs, appellee, pfs (U.S.).

Docket Entries — United States Court of Appeals for the Second Circuit

10-13-78	Issued mandate (opinion, judgment and statement of costs).
12-28-78	Filed notice of filing of petition for certiorari (S.C. #78-1007).
2-14-79	Original record returned to district court.
2-14-79	First supplemental record returned to district court.
5-29-79	Certified copy of order granting petition for writ of certiorari to Supreme Court filed (S.C. #78-1007).

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION and BOARD OF EDUCATION OF THE CITY OF NEW YORK and HEALTH AND HOSPITAL CORPORATION,

Defendants.

JURISDICTION AND VENUE

1. This action arises out of the Public Works Employment Act of 1977, 42 U.S.C. §6701, *et. seq.* (hereinafter referred to as "The Act") and alleges violations of the Constitution of the United States and Amendments Five and Fourteen thereto, the

Civil Rights Act of 1866 and 1964, 42 U.S.C. §§1981, 1983, 1985, Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d and Title VII, §701 of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* The amount in controversy exceeds Ten Thousand ($10,000) Dollars exclusive of interest and costs. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343.

2. Venue is properly laid in the Southern District of New York under 28 U.S.C. §§1391(b), 1392(a) and §1402(a)(1).

THE PARTIES

3. Plaintiff Building Trades Employers Association of the City of New York (hereinafter referred to as "BTEA") is an unincorporated association formed and organized under the laws of the State of New York with a principal place of business at 711 Third Avenue, New York, New York. "BTEA" is comprised of over 650 member firms and entities of both general contractors and specialty subcontractors many of which engage in and perform construction work on contracts let by the State and City of New York and their various agencies and departments.

4. Plaintiff General Contractors Association of New York, Inc., (hereinafter referred to as "GCA") is a corporation duly formed and organized under the laws of the State of New York with a principal place of business at 60 East 42nd Street, New York, New York. "GCA" is comprised of over 100 members, many of which engage in and perform construction work on contracts let by the State and City of New York and their various agencies and departments.

5. Plaintiff Trustees of the New York Building and Construction Industry Board of Urban Affairs Fund (hereinafter referred to as "Board of Urban Affairs") was created on or about the 25th day of April, 1969 by the execution of a trust agreement among plaintiffs BTEA, GCA and the Building and

Construction Trades Council of Greater New York [an unincorporated labor organization comprised of 110 unions in the building and construction industry with a principal place of business at 441 Lexington Avenue, New York, New York], one of the purposes of which, is to assist in the relations between minority groups and unions.

6. Plaintiff General Building Contractors of New York State, Inc., (hereinafter referred to as "GBC") is a not-for-profit corporation duly formed and organized under the laws of the State of New York. "GBC" is comprised of members which are building contractors located in New York City, Long Island, Westchester and the greater New York area, and many of which engage in and perform construction work on contracts let by the State and City of New York and their various agencies and departments.

7. Plaintiff Shore Air Conditioning Co., Inc., (hereinafter referred to as "Shore") is a corporation duly formed and organized under the laws of the State of New York with a principal place of business at 102-02 43rd Avenue, Corona, New York. Shore is a mechanical contractor who performs heating, ventilating and air-conditioning work.

8. Defendant Juanita Kreps (hereinafter referred to as "The Secretary") is the duly qualified and acting Secretary of Commerce of the United States of America, and under and by virtue of the Public Works Employment Act of 1977, 42 U.S.C. §6701, *et. seq.*, is charged with the administration thereof.

9. Defendant the State of New York, is a potential grantee under such Act, and upon information and belief, its agents, servants and employees are charged with the responsibility of the administration thereof at the grantee level.

10. Defendant the City of New York, is a municipality and a potential grantee under such Act, and upon information and

belief, its agents, servants and employees are charged with the responsibility of the administration thereof at the grantee level.

PUBLIC WORKS EMPLOYMENT ACT OF 1977

11. The Public Works Employment Act of 1977, 42 U.S.C. §6701, *et. seq.* authorizes the Secretary to make grants of monies to any State or local government for construction, demolition, renovation, repair or other improvement of local public works projects. Such construction demolition, renovation, repair or other improvement of local public works projects is required by the Act (42 U.S.C. §6705(e)(1)) to be performed by contract awarded by competitive bidding and not by any department, agency, or instrumentality of any State or local government, unless the Secretary affirmatively finds that some other method is in the public interest.

12. Upon information and belief, monetary grants pursuant to the Act have been, are being and will continue to be made to the State and City of New York and, in accordance with such grants, contracts have been, are, and will continue to be awarded pursuant thereto, and the Secretary has not made an affirmative finding in the public interest to the contrary.

13. Plaintiffs and their members and each of them have been, are, and will continue to bid on such projects funded pursuant to the provisions of the Act.

14. Section 103(f)(2) of said Act, 42 U.S.C. §6705(f)(2) provides that no grant shall be made pursuant to the Act, unless satisfactory assurance is given to the Secretary that at least ten percent (10%) of the amount of each grant shall be expended for Minority Business Enterprises. A Minority Business Enterprise is defined by this Section as a business at least 50 per centum of which, or a publicly owned business, at least 51 per centum of

the stock of which, is owned by minority group members defined as Negro, Spanish-speaking, Oriental, Indian, Eskimo or Aleut citizens of the United States.

15. A grantee under the Act, which must be a State or local government unit, may apply for a waiver of the 10% minority business enterprise requirement, but there are no statutory or regulatory means by which contractors, subcontractors, or unions may request such waiver.

16. Under Section 103(f)(2) of the Act, the Secretary has required and is continuing and upon information and belief will continue to require assurances from all grantees and upon information and belief, the Defendants Governor and Mayor of the State and City of New York, respectively, and their duly authorized representatives and delegates have given and are continuing and will continue to give assurances that at least 10% of the monies of said grant will go to Minority Business Enterprises.

17. As a result of the foregoing, plaintiffs and their members who have direct and/or prime contracts with the City and/or State of New York and each of them are suffering immediate, threatened, distinct and palpable competitive injury in that plaintiffs and their members and each of them have already and will continue to be forced and coerced to contract out work which they and each of them would normally have performed themselves, and have been and will be forced and coerced to seek out subcontractors and/or material suppliers not on the basis of a competitive bidding standard but merely on the basis of the statutory minority classifications and quotas.

18. As a result of the foregoing plaintiffs and their members many of which have subcontracts with general and/or prime contractors of the City and/or State of New York, and each of them are suffering immediate, threatened, distinct and palable

competitive injury in that plaintiffs and their members and each of them have already and will continue to be excluded and preempted, in whole or in part, from participating in the awarding of subcontracts by prime and/or general contractors not on the basis of competitive bidding standards but merely on the basis of statutory minority classifications and quotas.

19. Specific examples of the aforesaid injuries are as follows:

plaintiff Shore was the low bidder on the following contracts:

(1) Contract No. HHC-104, Project No. 2373001 let by the New York City Health and Hospitals Corp. for renovation of Harlem Hospital "K" Building, which contract was funded under the Act and the Bidding documents of which required designation of a Minority Business Enterprise ("MBE") pursuant to the Act. Plaintiff Shore's bid has been declared non-responsive because of the disputed legitimacy of the MBE named in Shore's bidding documents. As a result thereof, upon information and belief, such contract will be awarded to the second lowest bidder at an increased contract amount of $84,974, solely by reason of Shore's alleged failure to comply with Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2).

(2) Contract No. PW 116 let by the New York City Department of Parks which contract was funded under the Act and the bidding documents of which require designation of an MBE. Plaintiff Shore's bid has been declared non-responsive because of its failure to designate an MBE as required by section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2). Upon information and belief, that contract will or has been awarded to the fourth lowest bidder.

(3) Contract No. PW-124 let by the New York City Department of Public Works for renovation of the Brooklyn

Communication Office, which contract was funded under the Act and the bidding documents of which required designation of an MBE. Plaintiff Shore's bid, upon information and belief, is about to be declared non-responsive because of the disputed legitimacy of the MBE named in Shore's bidding documents. As a result thereof, upon information and belief, such contract will be awarded to a higher bidder at an increased contract amount, solely by reason of Shore's alleged failure to comply with Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2).

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

20. Plaintiffs repeat and reiterate paragraphs 1 through 19 with the same force and effect as if herein stated.

21. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is unconstitutional, void and unenforceable by reason of its violation of the fifth amendment to the United States Constitution.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

22. Plaintiffs repeat and reiterate paragraphs 1 through 21 with the same force and effect as if herein stated.

23. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is unconstitutional, void and unenforceable by reason of its violation of the fourteenth amendment to the United States Constitution.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

24. Plaintiffs repeat and reiterate paragraphs 1 through 23 with the same force and effect as if herein stated.

25. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of 42 U.S.C. §1981 and deprives these plaintiffs of their right to make and enforce contracts, contrary to and in violation thereof as aforesaid.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

26. Plaintiffs repeat and reiterate paragraphs 1 through 25 with the same force and effect as if herein stated.

27. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of 42 U.S.C. §1983 and deprives these plaintiffs of their rights, privileges and immunities secured by the Constitution and laws of the United States, contrary to and in violation thereof as aforesaid.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

28. Plaintiffs repeat and reiterate paragraphs 1 through 27 with the same force and effect as if herein stated.

29. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of 42 U.S.C. §1985 and deprives these plaintiffs of equal protection of the laws, and of equal privileges and immunities under the laws, contrary to and in violation thereof as aforesaid.

SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

30. Plaintiffs repeat and reiterate paragraphs 1 through 29 with the same force and effect as if herein stated.

31. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d and excludes these plaintiffs on the ground of race and color from participation in, and/or the receipt of benefits of, in whole or in part, programs and/or activities receiving Federal financial assistance, and subjects these plaintiffs to discrimination under those programs and activities all contrary to and in violation thereof as aforesaid.

SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

32. Plaintiffs repeat and reiterate paragraphs 1 through 31 with the same force and effect as if herein stated.

33. Section 103(f)(2), 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of Title VII, §701 *et seq.* of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* and discriminates against individuals with respect to these plaintiffs' and their members', terms, conditions and privileges of employment because of their race and color, and it limits, segregates and classifies these plaintiffs and their members in a manner which has, does and will continue to deprive and tend to deprive them of employment opportunity because of these plaintiffs' and their members' race and color contrary to and in violation thereof as aforesaid.

TEMPORARY AND PERMANENT INJUNCTIVE RELIEF NECESSARY AND PROPER

34. The enforcement of that portion of the Act requiring the expenditure of funds for Minority Business Enterprises, and the regulations promulgated thereunder will work unusual and irreparable hardship and burden upon these plaintiffs in that the said Act, by the imposition of such quotas, deprives and will

continue to deprive plaintiffs and other non-minority businesses of the opportunity, in whole or in part, to participate in the economic and social benefits of the funds granted under said Act, for which plaintiffs have no adequate remedy at law.

35. Such irreparable injury includes the wrongful, arbitrary and capricious discrimination and classification, and pattern of discrimination by defendants, and deprivation and future deprivation, in whole or in part, of the opportunity to participate in the economic and social benefits available under said Act.

TEMPORARY RESTRAINING ORDER NECESSARY AND PROPER

36. Bidding under the Act for the City of New York contracts is scheduled to be held as follows:

(i) Contract No. THW-122-IV let by the Division of Highway Operations until December 1, 1977 at 11:00 A.M. and Building Renovation Work at the Bronx (Spec. No. 618A-74/75 and 14-77/78), Brooklyn (Spec. No. 560A-74/75) and Staten Island (Spec. No. 13-77/78) let by the Board of Education, until December 1, 1977 at 2:00 P.M.,

(ii) Contract No. 7 let by Division of Public Structures for rehabilitation of heating system at New York City House of Detention for Men at Rikers Island until December 8, 1977 at 2:30 P.M.,

(iii) Contract No. 5, let by Division of Public Structures for telephone raceway system at the Queens House of Detention for Men, until December 13, 1977 at 2:30 P.M.,

(iv) Federal Public Works Project No. BHE 102 let by the Board of Education at various colleges of the City University of New York, until December 2, 1977 at 2:30 P.M.,

(v) EDA Project No. 112, Contract No. 3802 let by the Department of Ports and Terminals for additions to LCL Building, Howland Hook Marine Terminal, Staten Island, until December 5, 1977 at 3:00 P.M.,

(vi) EDA Project No. 114, Contract No. 3804 let by the Department of Ports and Terminals until December 6, 1977 at 12:00 noon.

Plaintiffs and its members will be irreparably harmed if the enforcement of the 10% minority business enterprise quota is not enjoined in connection with the bidding on the aforesaid projects. Plaintiffs will forever lose and be deprived of, in whole or in part, the opportunity to participate in these projects and will be deprived, in whole or in part, of the economic and social benefits available thereunder.

37. The attorneys for plaintiffs have contacted the United States Attorney for the Southern District of New York, the Attorney General of the State of New York and the Corporation Counsel for the City of New York and have advised them that plaintiffs will apply to this Court for a Temporary Restraining Order. In view of the immediate pendency of the bidding on the aforesaid project, plaintiffs will suffer irreparable harm by the delay that would be encountered in giving the defendants further notice of this Temporary Restraining Order.

WHEREFORE, plaintiffs pray for judgment as follows:

1. That a temporary restraining order issue restraining and enjoining the defendant Secretary, her agents, servants, employees and all persons in active concert with her from enforcing that part of the Act which requires, as a condition, to the funding thereunder that at least ten per cent of each project grant be expended for minority business enterprises, and enjoining and restraining the State of New York, the City of

New York, their agents, servants, employees and all persons in active concert with them from enforcing that part of the Act, which contains the 10% minority business enterprise requirement as a condition thereto to the funding thereunder, and enjoining all defendants from enforcing any portion of any contract, agreement or bid containing the 10% minority business enterprise requirement.

2. That a preliminary injunction issue restraining and enjoining the defendant Secretary, her agents, servants, employees and all persons in active concert with her from enforcing that part of the Act which requires, as a condition, to the funding thereunder that at least ten per cent of each project grant be expended for minority business enterprises, and enjoining and restraining the State of New York, the City of New York, their agents, servants, employees and all persons in active concert with them from enforcing that part of the Act which contains the 10% minority business enterprise requirement as a condition thereto to the funding thereunder, and enjoining all defendants from enforcing any portion of any contract, agreement or bid containing the 10% minority business enterprise requirement.

3. That upon a final hearing upon the merits, a permanent injunction issue restraining and enjoining the defendant Secretary, her agents, servants, employees and all persons in active concert with her from enforcing that part of the Act which requires, as a condition to the funding thereunder, that at least ten per cent of each project grant be expended for minority business enterprises, and enjoining and restraining the State of New York, the City of New York, their agents, servants, employees and all persons in active concert with them from enforcing that part of the Act which contains the 10% minority business enterprise requirement as a condition thereto to the funding thereunder, and enjoining all defendants from enforcing any portion of any contract, agreement or bid containing the 10% minority business enterprise requirement.

4. That a declaratory judgment issue that Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is unconstitutional, illegal void and unenforceable.

5. That plaintiffs receive all costs and expenses incurred in the prosecution of this action together with reasonable attorneys' fees and;

6. That plaintiffs receive such order, further and additional relief as to the Court may seem just and equitable.

DATED: November 30, 1977

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s/ Robert A. Kennedy
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ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER DATED NOVEMBER 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Upon reading and filing the annexed affidavits of ISAAC BERMAN, sworn to November 30th, 1977 and JAMES DOOLEY, sworn to November 29th, 1977, with the exhibits annexed thereto and the complaint in this action, let defendants, Juanita Kreps, Secretary of Commerce of The United States of America, The State of New York and The City of New York, show cause before the Hon. Henry F. Werker, one of the Judges of this Court, in Room 318, of the United States Courthouse, Foley Square, New York, New York, at 10:00 a.m. on December 2nd, 1977, or as soon thereafter as counsel can be heard why an order should not be made pursuant to Rule 65 of the Federal Rules of Civil Procedure, preliminarily enjoining said federal defendant, pending the final determination of this action, from enforcing that part of the Public Works Employment Act of 1977 which requires, as a condition for receiving federal funding, that at least 10% of each project funded under said act be expended for minority business enterprises and enjoining said defendants who are grantees under the Public Works Employment Act of 1977 from enforcing that portion of any of their contracts which contains a minority business enterprise requirement pursuant to the provisions of said Act, and

It appearing that several contracts for projects funded under the Public Works Employment Act of 1977 and containing a requirement pursuant to said Act that certain percentages of the work under said contracts be allocated to minority business enterprises are scheduled for imminent letting by the City of New York at various times during the month of December, 1977, and that the letting of these contracts with such minority HFW

business enterprise requirements will cause irreparable injury to plaintiffs and their members before a hearing on the merits can be had, it is

ORDERED, that pending this Court's hearing and determination of plaintiffs' motion for a preliminary injunction those defendants who are grantees under the Public Works Employment Act of 1977 are hereby restrained from requiring as a condition to the award of any such contract that the bidders on said contracts name and designate in their bids a minority business enterprise, and from enforcing on contracts let or to be let that portion of the Act which requires minority business enterprise participation in contracts funded under the Act, and it is further HFW

ORDERED, that pending this Court's hearing and determination of plaintiff's motion for a preliminary injunction the Secretary of Commerce, her agents, servants, employees and all persons or agencies acting in concert with her are hereby restrained from cancelling, withdrawing or revoking any grants heretofore made or hereafter to be made under the Act and from refusing to disburse monies to grantees under the Act by reason of any non-compliance with the MBE provisions of the Act, and it is further

ORDERED, that plaintiffs or any one of them post a bond or other security in the amount of $ for the payment of such costs and damages as may be incurred or suffered by the above-named defendants if it is subsequently determined that they were wrongfully restrained or enjoined, and it is further

ORDERED, that, sufficient reason appearing therefor, a copy of this Order, and the papers upon which it is granted, and plaintiff's bond or statement of other security be personally served upon the defendant by personal service on or before 5

Order to Show Cause with Temporary Restraining Order Dated November 30, 1977

p.m. December 1, 1977, and that such service be deemed good and sufficient service thereof.

Dated: New York, New York
November 30, 1977

Issued: 5:30 P.M.

s/ Henry F. Werker
U.S.D.J.

AFFIDAVIT OF ISAAC BERMAN SWORN TO NOVEMBER 30, 1977 IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMANN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR T. GAFFNEY, as President of BUILDING TRADES EMPLOYERS ASSOCIATION; GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.; THE GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC.; and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; THE STATE OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ISAAC BERMAN, being duly sworn, deposes and says:

1. I am the President of Shore Air-Conditioning Co., Inc. ("Shore"), one of the plaintiffs in the above-entitled action and

as such I am fully familiar with all of the facts and circumstances hereinafter set forth.

2. Shore, a New York corporation, is a fully experienced mechanical contractor specializing in heating, ventilating and air-conditioning work and has, to date, performed numerous contracts let by the City of New York through its various agencies.

3. This affidavit is made in support of plaintiffs' application for a temporary restraining order and preliminary injunction as set forth in the complaint herein.

4. On or about November 9, 1977 Shore, pursuant to advertisement therefor, submitted to the New York City Health and Hospitals Corporation ("Health and Hospitals Corporation") a bid in the sum of $1,380,000 for the performance of the heating, ventilating and air-conditioning work on the Harlem Hospital "K" Building renovation job in the City, County and State of New York.

5. The funds for the aforesaid job have been derived through a grant from the federal government pursuant to the provisions of the Public Works Employment Act of 1977, hereinafter referred to as the "Act".

6. Pursuant to the terms and provisions of the Act, Health and Hospitals Corporation, as a grantee under the Act, required in its bidding documents for the aforesaid job that each bidder name and designate a minority business enterprise ("MBE") which the bidder would use in the performance of the contract in the event said bidder were awarded the contract.

7. Shore, in its bid to the Health and Hospitals Corporation, named Aircontrol Industries, Inc. ("Aircontrol") as

its designated MBE subcontractor to perform the sheet metal work on the aforesaid job in the event Shore was the low bidder. Said MBE qualified in all respects with the provisions of the Act and all rules, regulations and guidelines issued pursuant thereto.

8. Shore's bid of $1,380,000 was the low bid on the aforesaid contract.

9. Subsequent to the receipt of Shore's bid, Health and Hospitals Corporation, without cause or justification, determined that Shore's designated MBE, Aircontrol, was not a *bona fide* MBE as required by the Act and, on November 22, 1977, declared Shore's bid to be "not responsive" and awarded the aforesaid contract to the second low bidder whose bid was approximately $85,000 greater than Shore's. On information and belief, Health and Hospitals Corporation will shortly enter into a formal contract for the aforesaid job with the second low bidder.

10. That by reason of the inclusion of the 10% MBE requirements of the Act in the bidding documents for the aforesaid job and by reason of the arbitrary, capricious and unreasonable implementation of said requirements, Shore will lose and be deprived of the award of said job and of the anticipated profits connected therewith unless the enforcement of the MBE requirements of the Act are immediately enjoined.

11. In addition to the foregoing, the following jobs, which are funded under the Act and the bidding documents for which contain the MBE requirement prescribed by the Act, have been advertised for letting in the very near future:

> Harlem Hospital — Elimination of new nurses residences, boiler plant Health and Hospitals Corporation Project No. 23-76-003;

Bronx House of Detention, City of New York General Services Administration — Division of Public Structures;

Heating work, Rikers Island House of Detention — City of New York General Services Administration;

Food Warehouse — City of New York Department of Ports and Terminals;

Brooklyn Academy of Music, City of New York General Services Administration, Division of Public Structures.

12. That by reason of the MBE provisions of the Act being included in the bidding documents for the above-mentioned jobs and also by reason of the refusal of the New York City Office of Minority Business Enterprise to certify Aircontrol as a *bona fide* MBE, Shore has been prevented and excluded from submitting bids on the above-mentioned jobs.

13. That unless the enforcement of the MBE provisions of the Act is immediately restrained and enjoined, Shore will suffer immediate and irreparable damage by reason of its not being able to bid said work because of its inability to comply with the MBE bidding requirement and to qualify as a responsive bidder.

14. If the enforcement of the 10% MBE provisions of the Act is not enjoined, Shore will be irreparably damaged in connection with any work that it does bid in that it will be required to (a) subcontract work to MBEs, which work it would ordinarily perform with its own forces and not subcontract out; (b) enter into subcontracts with subcontractors other than those of its own choosing and chosen solely by reason of their being MBEs; and (c) increase the amount of its bids to cover the risk and the cost of unexpected contingencies which would not be

present if the MBE provisions of the Act were not required by the bid document for such work.

15. Based on the foregoing, your deponent respectfully requests that the preliminary restraining order and injunctive relief requested in the complaint herein be granted.

16. This application is brought on by order to show cause in order that a prompt and immediate determination may be had so as to prevent the defendants' continued violation of plaintiffs constitutional rights and because of the imminent nature of defendants' acts of letting and awarding various contracts. It is in the public interest as well as plaintiffs' that the matters alleged in the complaint and in this affidavit be promptly brought before the court for determination.

s/ Isaac Berman
Isaac Berman

Sworn to November 30, 1977

AFFIDAVIT OF JAMES J. DOOLEY SWORN TO NOVEMBER 29, 1977 IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES J. DOOLEY, being duly sworn, deposes and says:

1. I am the acting Executive Director of The New York Building and Construction Industry Board of Urban Affairs Fund ("BUA"), one of the plaintiffs herein and as such I am fully familiar with the following facts.

2. The BUA represents and is comprised of members of the construction industry in the greater New York City area many of whom perform work as prime contractors and many more of whom perform work as subcontractors on construction work let by the City and State of New York. It should also be noted that many of the firms represented by the BUA are entities which qualify as minority business enterprises ("MBE") under the Public Works Employment Act of 1977 (the "Act").

3. Annexed hereto as Exhibit "A" is a list of the contracts about to be let by the various agencies of the City of New York which are funded under the Act and the bidding documents for which contain the requirement that the bidders name and designate an MBE which will perform a designated percentage of the work under said contracts.

4. If the enforcement of the MBE provisions of the Act is not immediately enjoined, members of the BUA and members of the construction industry at large, many of whom will be bidders

on the work listed in Exhibit A, will be irreparably harmed and damaged in that they will be required to (a) subcontract work which they would ordinarily perform with their own forces and not subcontract; (b) enter into subcontracts with subcontractors other than those of their own choosing and other than those with whom a long standing relationship of trust and confidence has been established; (c) assume substantial risks in being required to hire MBEs which are unknown to them and whose ability to adequately perform the work is questionable; and (d) alter their bidding and pricing procedures in various other respects, all to the end of complying with the unconstitutional MBE provisions of the Act.

5. If the enforcement of the MBE provisions of the Act is not enjoined, members of the BUA and members of the construction industry at large who normally perform work as subcontractors to prime contractors with the City of New York and the State of New York will be irreparably harmed in that they will not be awarded such subcontract work by said prime contractors because a preference must be given to MBEs by said prime contractors in order for them to qualify as responsible bidders on contracts funded under the Act. As a result, the work which, but for the MBE requirement of the Act, would normally be given to said subcontractors will be forever lost to them, all because of the preferential treatment of MBEs as required by the Act. The loss of this work could very well cause the financial ruin of many long-established subcontractors who will be deprived of work solely because they are not MBEs.

6. By reason of the foregoing, it is respectfully requested that the temporary and permanent injunctive relief requested in the complaint herein be granted.

s/ James J. Dooley
James J. Dooley

Sworn to November 29, 1977

EXHIBIT A — LIST OF CITY OF NEW YORK AGENCY CONTRACTS ANNEXED TO FOREGOING AFFIDAVIT

CITY CONTRACTS TO BE AWARDED UNDER PUBLIC WORKS ACT
PART II

DEPARTMENT	JOB & LOCATION	VALUE
November 30		
Department of Environmental Protection	DWR-115 80th St., Sewers and Street Reconstruction	$ 887,233
December 1		
Department of Transportation (Division of Highways Operations)	THW-122-IV Painting of Various Waterway Bridges Manhattan & Staten Island	1,966,127
Board of Education	BE-136 Miscellaneous upgrading work at PS 133, DeWitt Clinton HS, Bx.	1,878,541
	BE-136 Miscellaneous upgrading work at PS 35 Brooklyn	1,713,000
	BE-135 Miscellaneous upgrading at Curtis HS, Staten Island	398,857
December 2		
Board of Higher Education	BHE-102 Renovation of Lehman, Queens, Bronx Community and Staten Is. Colleges	1,021,335
December 5		
Dept. of Transportation Bureau of Ferry and General Aviation Oper.	TFA-104 Reconstruction of Ferry Racks St. George Transportation Terminal, Staten Island	2,100,000

Exhibit A Annexed to Foregoing Affidavit

Division of Highways Operations	THW-109-1 St. Reconstruction in McDonald Ave. from Cortelyou Rd. to Ave. X, Shell Road, etc., Brooklyn	6,334,242
Dept. of Parks & Terminals	EDA-112 Improvement to Howland Hook Marine Terminal, Staten Island (two awards same day on this project)	4,545,000
December 6		
Department of Ports and Terminals	EDA-114 Expansion and improvement of existing Krasdale Foods Warehouse at Hunts Point, Bronx (two awards same day on this project)	$4,200,000
December 7		
Dept. of Transportation (Division of Highways Operation)	THW-122-V Painting of various Waterway Bridges Brooklyn & Queens	1,966,127
December 8		
Dept. of Genl. Services (Division of Public Structures)	PW-121 Miscellaneous Rehabilitation and upgrading in various correctional institutions City-wide (two contracts to be awarded)	1,097,812
December 9		
Dept. of Genl. Services (Division of Public Structures)	PW-115 Surrogate's Court Rehabilitation, Exterior and Conversion of Municipal Reference & Research Center, Improved access for the Handicapped in three city-owned buildings, city-wide (several contracts to be awarded)	1,370,850

Exhibit A Annexed to Foregoing Affidavit

December 13		
New York City Health and Hospitals Corp.	HHC-105 Improvements for access of the Handicapped in various municipal hospitals-city wide	1,881,495
Dept. of Genl. Services	PW-121 Miscellaneous rehabilitation and upgrading in various correctional institutions, city wide (Three contracts to be awarded)	1,097,812
December 15		
Dept. of Genl. Services (Division of Public Structures)	PW-121 Miscellaneous rehabilitation and upgrading in various correctional institutions, city wide	1,097,812
December 20		
Dept. of Genl. Services (Division of Public Structures)	PW-102 Miscellaneous Rehabilitation and renovation work in the Brooklyn Academy of music — Brooklyn	2,385,680

AFFIDAVIT OF ROBERT G. BENISCH SWORN TO NOVEMBER 30, 1977 IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT G. BENISCH, being duly sworn, deposes and says:

1. I am a member of the firm of Berman, Paley, Goldstein & Berman, one of the attorneys for the plaintiffs herein. I make this affidavit for purposes of demonstrating compliance with Rule 65 of the Federal Rules of Civil Procedure.

2. On November 29, 1977 at or about 3:00 in the afternoon, I personally contacted by telephone Theodore Gilbert, Esq., Assistant Corporation Counsel for the City of New York and George Zukerman, Assistant Attorney General and Chief of the Civil Rights Bureau of the Office of the Attorney General of the State of New York and I caused to be contacted by telephone William Tendy, Chief Assistant United States Attorney and advised said persons that this action would be commenced by the filing of the complaint during the afternoon of Wednesday, November 30, 1977 and that in connection with said action an application for a temporary restraining order would be made to the court. I believe that based upon this notice the requisites of Rule 65 have been complied with.

3. As indicated in the accompanying affidavits of Isaac Berman and James J. Dooley, the defendants herein are about to engage in activities which will result in the violation of plaintiffs' constitutional rights and immediate and irreparable

Affidavit of Robert G. Benisch Sworn to November 30, 1977 in Support of Motion

harm to them should the contemplated activity not be enjoined forthwith.

4. This application for a temporary restraining order is brought on by order to show cause in order that a prompt and immediate determination be obtained and the contemplated illegal acts of defendants be enjoined.

5. No previous application for the relief sought in this action has heretofore been made.

s/ Robert G. Benisch
Robert G. Benisch

Sworn to November 30, 1977

AFFIDAVIT OF ANTHONY J. SULVETTA SWORN TO DECEMBER 1, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5786 (HFW)

H. Earl Fullilove, et al.

Plaintiffs,

v.

Juanita Kreps, Secretary of Commerce of the United States of America; State of New York and City of New York

Defendants.

District of Columbia:

I, Anthony J. Sulvetta, depose and say as follows:

1. Affiant holds four degrees from the George Washington University, Washington, D.C., — Bachelor of Arts Degree in Government Studies (1966), Master of Arts Degree in Economics (1968), Master of Philosophy Degree (1970), and Doctor of Philosophy Degree in Economics (1976).

2. Affiant has worked in the area of economic development and economic research for more than 13 years. A significant portion of this work has dealt with public works and countercyclical employment generation. Affiant currently serves as Chief, Program Analysis Division, Economic Development Administration, holding management responsibility for a staff of 24 professionals, 4 clerical assistants, and approximately 30 contractor personnel engaged in evaluative research of the

effectiveness of countercyclical employment programs, urban and rural economic development investments, economic policy development and program design, economic adjustment assistance, and institutional development and planning capacity. Affiant earlier served as: (1) a general associate for the consulting firm of Linton, Mields, and Coston, Inc., supervising staff of up to eight professionals in economic research studies, including an evaluation of the Public Works Impact Program; (2) as an economist with the Economic Development Administration, supervising subordinate staff in a variety of economic impact studies; and (3) as an economist with Sterling Institute (consultants), supervising staff of three professionals in preparing materials for experimental economics program.

3. Relevant recent publications authored or co-authored by affiant include: "*Public Works: Economic Development and Employment Stabilization* (1977); *An Examination of Factors Affecting the Employment Impact of an Accelerated Public Works Program* (doctoral dissertation, 1976); *Alleviating Unemployment Through Accelerated Public Works in the United States: An Historical Perspective* (1976); and *An Evaluation of the Public Works Impact Program (PWIP)* (1975).

4. Affiant is informed that pursuant to the Public Works Employment Act of 1976 (Public Law 94-369, 90 Stat. 99) (July 22, 1976), as amended by Public Law 95-28, 91 Stat. 116 (May 13, 1977), 42 U.S.C. 6701-6710) and the regulations and procedures promulgated to implement said Act, that as of September 30, 1977 there are 8591 approved Round II LPW Grants nationwide, 45 Round II LPW Grants awarded to the State of New York, and 83 Round II LPW Grants awarded to the City of New York in the total amounts of approximately $4 billion, $42,119,000, and $193,838,646, respectively. (Annexed hereto as "Exhibit A" is the list of approved projects for the State of New York and the City of New York).

5. Annexed hereto as "Exhibit B": is a true copy of excerpts from *County Business Patterns, United States,* U.S. Department of Commerce, Bureau of the Census (1974) and *County Business Patterns, New York,* (1975) U.S. Department of Commerce, Bureau of the Census, reflecting the minimum number of construction contractors available in the United States, the State of New York and the City of New York.

6. Affiant states that based on methodological techniques and information sources discussed in following sections, the estimated project employment and cost characteristics for the 83 Local Public Works projects awarded to the City of New York and the 45 Local Public Works projects awarded to the State of New York and the 8591 approved local Public Works grants nationwide are as follows:

(a) Estimated Employment Generation

(1) City of New York Projects. The City of New York Projects, involving total construction costs of $196,497,729 will generate approximately:

5039 direct jobs (construction person years);

1618 indirect jobs (person years);

11987 - 13499 induced jobs (person years);

for an estimated total of 18644 to 20156 person years of employment. Direct on-site construction employment will involve approximately 6,348,842 hours of employment, the equivalent of a full year of employment for 5039 construction workers. Based on EDA's past experience with the Public Works Impact Program, the average period of worker employment duration on a public works project lasted for less than one month (about 155.8 hours) which translates into approximately

40,750 workers to be employed directly on this project activity. Estimates of indirect jobs associated with contractor construction-industry related expenditures, computed below, indicate that an estimated 1618 jobs (person years) will be generated in construction-related industries. Induced employment effects, employment and income effects associated with spending patterns of construction-related employees and their employers for goods and services, are estimated to be between 18644 and 20156 person years of employment. Estimates of the numbers of individual workers to be employed in indirect and induced jobs, comparable to those associated with direct on-site construction employment, can not be reliably estimated.

(2) State of New York Projects.

The Local Public Works projects in the State of New York, involving total construction costs of $45,089,500, will generate approximately:

1156 direct jobs (construction person years);

371 indirect jobs (person years);

2570-3097 induced jobs (person years);

for an estimated total of 4277 to 4624 person years of employment. Direct on-site construction employment will involve approximately 1,456,842 hours of employment, the equivalent of a full year of employment for 1156 construction workers. Based on EDA's past experience with the Public Works Impact Program, the average period of worker employment duration on a public works project lasted for less than one month (about 155.8 hours) which translates into approximately 9351 workers to be employed directly on the 45 project activities in the State of New York. Estimates of indirect jobs associated

with contractor construction-related expenditures, computed below, indicate that an estimated 371 jobs (person years) will be generated in construction related industries. Induced employment effects, employment and income effects associated with spending patterns of construction-related employees and their employers for goods and services, are estimated to be between 4277 and 4624 person years of employment. Estimates of the numbers of individual workers to be employed in indirect and induced jobs, comparable to those associated with direct on-site construction employment, can not be reliably estimated.

(3) United States Local Public Works Projects.

The Local Public Works projects nationally, involving total construction costs of $5,011,125,948, (which includes total LPW funds and contributions by grantees) will generate approximately:

128,500 direct jobs (construction person years);

41,249 indirect jobs (person years);

305,701 — 344,251 induced jobs (person years);

for an estimated total 475,450 to 514,000 person years of employment. Direct on-site construction employment will involve approximately 161,909,479 hours of employment, the equivalent of a full year of employment for 128,500 construction workers. Based on EDA's past experience with the Public Works Impact Program, the average period of worker employment duration on a public works project lasted for less than one month (about 155.8 hours) which translates into approximately 1,039,214 workers to be employed directly on the 8,591 project activities in the United States. Estimates of indirect jobs associated with contractor construction-industry related expenditures, computed below, indicate that an estimated 41,249

jobs (person years) will be generated in construction-related industries. Induced employment effects, employment and income effects associated with spending patterns of construction-related employees and their employers for goods and services, are estimated to be between 305,701 and 344,251 person years of employment. Estimates of the numbers of individual workers to be employed in indirect and induced jobs, comparable to those associated with direct on-site construction employment, can not be reliably estimated.

7. The methodological procedures and information sources used in deriving the above estimates are as follows:

(a) Employment Estimates

Direct on-site construction employment estimates were developed using the results of a recent study conducted by the Rand Corporation, titled *Regional Cycles and Employment Effects of Public Works Investments* (Rand Publication Number R-2052-EDA, January, 1977), along with construction cost indexes published by the Engineering News Record (ENR). Rand estimated that for each billion dollars of public works contract expenditures in 1974, 42,067,620 hours of direct on-site employment would be generated. Equivalently, each hour of employment costs $23.77 in wages, materials, overhead, and other directly related construction costs. In order to correct this figure to reflect current construction costs, the average of the national 1974-1977 rates of change in the ENR Building Cost Index (30.3%) and the ENR Construction Cost Index (30.1%), i.e., 30.2%, was used as follows:

$$\frac{\$1,000,000,000}{(1.302)\ (\$23.77)} = 32,310,000 \text{ hours}$$

indicating that an expenditure of one billion dollars at 1977 cost

levels would result in 32,310,000 hours of on-site construction employment. Since the New York City projects involve a total cost of $196,497,729, total on-site employment to be generated by this project was estimated in the following manner:

$$\frac{\$196,497,729}{\$1,000,000,000} \times 32,310,000 = 6,348,842$$

In addition, Rand determined that the average construction worker worked approximately 1,260 hours per year. Hence, 6,348,842 hours divided by 1,260 hours provides an estimate of 5039 worker-years of on-site construction employment. As previously indicated, a study undertaken by the Economic Development Administration (*Evaluation of the Public Works Impact Program (PWIP), Final Report,* January, 1975, p. 70) estimated that the average duration of employment by a worker on a public works project was approximately 155.8 hours. Thus the Rand-derived estimate of 6,348,842 hours of employment divided by 155.8 hours per job indicates that approximately 40,750 individual workers may be directly provided employment opportunities on the project over the duration of overall project construction activities. The Rand study also estimated that for each direct construction job created (defined as 1,260 hours of employment), approximately 0.321 indirect jobs (man-years of employment in construction-related industries) will be generated. Specifically, Rand found that 10,725 indirect and 33,387 direct jobs were generated per billion dollars of public works construction expenditures. Hence, 10,725 divided by 33,387 equals 0.321. Applying this figure to the 5039 direct jobs cited above provides an estimate of 1618 indirect construction-related jobs. (Rand study, Table S-2.) Induced and indirect employment — that related to employment and income effects associated with worker and contractor expenditure patterns — was estimated by Rand to be 2.7 to 3.0 jobs per direct construction

job, e.g., that for every direct job, an additional 2.7 to 3.0 jobs (man-years of employment) will be generated elsewhere in the economy. Overall, for the project under consideration, involving a total cost of $196,497,729, between 18644 and 20156 total jobs (person-years of employment) — direct, indirect and induced — are estimated to be generated.

(2) State of New York Projects.

The 45 projects in the State of New York involve a total cost of $45,089,500, total on-site employment to be generated by these projects was estimated in the following manner:

$$\frac{\$45,089,500}{\$1,000,000,000} \times 32,310,000 = 1,456,842$$

In addition, Rand determined that the average construction worker worked approximately 1,260 hours per year. Hence, 1,456,842 hours divided by 1,260 hours provides an estimate of 1156 worker-years of on-site construction employment. As previously indicated, a study undertaken by the Economic Development Administration (Evaluation of the Public Works Impact Program (PWIP), Final Report, January, 1975, p. 70) estimated that the average duration of employment by a worker on a public works project was approximately 155.8 hours. Thus, the Rand-derived estimate of 1,456,842 hours of employment divided by 155.8 hours per job indicates that approximately 9351 individual workers may be directly provided employment opportunities on the 45 projects over the duration of overall project construction activities. The Rand study also estimated that for each direct construction job created (defined as 1,260 hours of employment), approximately 0.321 indirect jobs (man-years of employment in construction-related industries) will be generated. Specifically, Rand found that 10,725 indirect and 33,387 direct jobs were generated per billion dollars of public

works construction expenditures. Hence, 10,725 divided by 33,387 equals 0.321. Applying this figure to the 1156 direct jobs cited above provides an estimate of 371 indirect construction-related jobs. (Rand study, Table S-2.) Induced and indirect employment — that related to employment and income effects associated with worker and contractor expenditure patterns — was also estimated by Rand to be 2.7 to 3.0 jobs per direct construction job, e.g., that for every direct job, an additional 2.7 to 3.0 jobs (man-years of employment) will be generated elsewhere in the economy. Overall, for the 45 projects under consideration, involving a total cost of $45,089,500 between 4277 and 4624 total jobs (worker-years of employment) — direct, indirect and induced — are estimated to be generated.

(3) United States Local Public Works Projects.

The 8,591 LPW projects in the United States involve a total cost of $5,011,125,948, total on-site employment to be generated by these projects was estimated in the following manner:

$$\frac{\$5,011,125,948}{\$1,000,000,000} \times 32,310,000 = 161,909,479 \text{ hours}$$

In addition, Rand determined that the average construction worker worked approximately 1,260 hours per year. Hence, 161,909,479 hours divided by 1,260 hours provides an estimate of 128,500 worker-years of on-site construction employment. As previously indicated, a study undertaken by the Economic Development Administration (*Evaluation of the Public Works Impact Program (PWIP), Final Report,* January, 1975, p. 70) estimated that the average duration of employment by a worker on a public works project was approximately 155.8 hours. Thus, the Rand-derived estimate of 161,909,479 hours of employment divided by 155.8 hours per job indicates that approximately 1,039,214 individual workers may be directly provided

employment opportunities on the 8,591 projects over the duration of overall project construction activities. The Rand study also estimated that for each direct construction job created (defined as 1,260 hours of employment), approximately 0.321 indirect jobs (man-years of employment in construction-related industries) will be generated. Specifically, Rand found that 10,725 indirect and 33,387 direct jobs were generated per billion dollars of public works construction expenditures. Hence, 10,725 divided by 33,387 equals 0.321. Applying this figure to the 128,500 direct jobs cited above provides an estimate of 41,249 indirect construction-related jobs. (Rand study, Table S-2.) Induced and indirect employment — that related to employment and income effects associated with worker and contractor expenditure patterns — was also estimated by Rand to be 2.7 to 3.0 jobs per direct construction job, e.g., that for every direct job, an additional 2.7 to 3.0 jobs (man-years of employment) will be generated elsewhere in the economy. Overall, for the 8,591 projects under consideration, involving a total cost of $5,011,125,948, between 475,450 and 514,000 total jobs (person-years of employment) — direct, indirect and induced — are estimated to be generated.

(b) Construction Cost Implications

Effects of delaying construction activities can be estimated using information published in the *Engineering News Record* (ENR). ENR publishes two general, widely used construction cost indexes based on data obtained in 20 large cities. (See attached Exhibit C). ENR estimates that construction costs will increase nationally between 9.4% and 9.3%, as measured by their Construction Cost Index and Building Cost Index, respectively, between December 1976 and December 1977 (See attached "Exhibit D" for appropriate computational bases.) Using an unweighted average of these two indexes, the 1976-1977 national

annual rates of increase of construction costs is estimated to be 9.35% (average of 9.3% and 9.4%).

(1) City of New York Projects.

Assuming the rate of construction cost increase remains constant, a one-year delay would increase construction costs for the City of New York projects by approximately an additional $18,372,538; a two-year delay would increase construction costs by approximately an additional $38,462,908.

(2) State of New York Projects.

Similarly, a one-year delay would increase construction costs for the 45 State of New York projects by approximately an additional $4,215,868; a two-year delay would increase construction costs by approximately an additional $8,825,920.

(3) United States LPW Projects.

Similarly, a one-year delay would increase construction costs for the 8,591 United States Local Public Works projects by approximately an additional $469 million; a two-year delay would increase construction costs by approximately an additional $981 million.

8. The most recent unemployment data for the United States indicates 6,872,000 unemployed workers for the month of October 1977, of which 549,000 were construction-associated workers. The overall unemployment rate in October 1977 was 7.0%, compared to an estimated 12.2% for the construction industry. (Source: Bureau of Labor Statistics)

Affidavit of Anthony J. Sulvetta Sworn to December 1, 1977

s/ Anthony J. Sulvetta
Anthony J. Sulvetta, Chief
Program Analysis Division
Economic Development Administration

Sworn to December 1, 1977

AFFIDAVIT OF MARY C. DALY SWORN TO DECEMBER 5, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MARY C. DALY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and as such I am familiar with the above-captioned matter.

2. I submit this affidavit in further support of the Federal Government's opposition to the consolidation of the trial in the instant matter with the hearing on plaintiffs' motion for a preliminary injunction or in the alternative in support of the Government's motion for a continuance of such trial.

3. The instant case was filed on Wednesday, November 30, 1977. Plaintiffs' served a copy of a complaint and their order to show cause papers on this office that afternoon. At 4:00 p.m. that same day the Court conducted a hearing on plaintiffs' application for temporary restraining order and announced, in denying the temporary restraining order, that a hearing would be held on Friday, December 2, 1977 at 10:00 a.m. on plaintiffs' motion for a preliminary injunction. The Court also announced that it would treat that hearing on Friday, December 2, 1977 as a hearing on the merits of the case.

4. On the present state of the record the Federal Government submits that plaintiffs have not proved a case

sufficient to warrant the granting of preliminary relief or to save them from having their case dismissed. We further submit that Section 103(f)(2) of the Public Works Employment Act is constitutional for the reasons advanced in our memoranda of law and argued at the December 2 hearing.

5. Between the filing of the Complaint and the hearing on plaintiffs' application for a TRO and the trial on December 2, the Government had at best one full working day to gather evidence, locate witnesses and submit a memorandum of law. In the extraordinarily abbreviated time between the date the Complaint was filed and the hearing, the Government did not have sufficient opportunity for full investigation and discovery. Accordingly, if this Court refuses to dismiss the complaint the Secretary respectfully requests the Court to allow it to offer additional evidence. In particular, the Government is presently seeking persons to testify about the following topics:

(a) The MBE Waiver program, its procedures, requirements and standards, and its application in the State of New York, the City of New York and to the Round II grants in issue.

(b) The availability of competent Minority Business Enterprises in the various construction specialties of raw and finish material supply fields relevant to the grants and contracts in issue, as well as generally.

(c) The responsiveness and competitiveness of the bidders bidding in competition with the contractor testifying on behalf of the plaintiffs.

(d) The procedures which would need to be followed to readvertise and rebid any contracts if the MBE requirements of §103(f)(2) of the PWEA were enjoined,

the extended time requirements of such readvertising and rebidding, and the resulting delay in the start of construction.

(e) The bids submitted in competition with those of witnesses DiMenna and LoCurto and plaintiff, Shore Air Conditioning Company.

(f) The status as member of plaintiff charter of the Associated General Contractors of America, Inc. of witnesses DiMenna and LoCurto and plaintiff Shore Air Conditioning Company and their compliance with Section 103(f)(2).

(g) The availability, competency and competitiveness of bona fide MBEs in various construction specialties and raw and finish material supply fields.

(h) Discrimination on the basis of race and national origin in the construction industry.

5. For the Court's information and in connection with the argument set forth at page 14 of the Government's post-hearing memorandum of law, I am annexing hereto a copy of the complaints in the following cases: *Montana Contractors Ass'n. v. Secretary of Commerce, Ohio Contractors Ass'n. v. Economic Development Administration* and *Florida East Coast Chapter of Associated General Contractors v. Secretary of Commerce.*

s/ Mary C. Daly
MARY C. DALY

Sworn to December 5, 1977.

AFFIDAVIT OF M. L. BANNER SWORN TO DECEMBER 5, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

I, M.L. Banner, being duly sworn, depose and say that I am the Chief of the Civil Rights Division of the Atlantic Regional Office of the Economic Development Administration and have held that position since May of 1974.

Affiant is responsible for the supervision of all Civil Rights Specialists who review all requests for waiver of the ten percent minority business enterprise provision of the Public Works Employment Act of 1977, P.L. 95-28.

Affiant instructed Civil Rights Specialists not to grant any waivers of the 10% minority business enterprise requirement which were submitted with the original project application unless the Applicant submitted information on the size of the minority population in the project area, the availability of minority enterprise in the reasonable trade area from which contractors, subcontractors and suppliers will be drawn for the project, the efforts the grantee and prime contractors have exerted to enlist minority firms and other relevant facts that might further the request.

A waiver request would be considered at any time, pre-bid or post-bid, provided that the proper documentation was submitted with the request.

Affiant instructed the Civil Rights Specialists under his supervision to instruct each applicant requesting a waiver that the above referenced documentation was required to support any waiver request and, that the waiver request would be considered at any time, pre-bid or post-bid, as aforesaid.

Affidavit of M. L. Banner Sworn to December 5, 1977

Affiant, based on knowledge and belief, understands that all instructions have been followed by the Civil Rights Specialists under his supervision.

Affiant further states that according to the records maintained in his office no requests for waivers were submitted by either the City of New York or the State of New York. If a request had been submitted, the Applicant would have been told that a waiver could be granted at such time as the Applicant submitted the required information as aforesaid.

s/ M. L. Banner
M. L. Banner, Chief
Civil Rights Division

Sworn to December 5, 1977.

TRANSCRIPT OF PROCEEDINGS BEFORE HON. HENRY F. WERKER, D.J. DATED DECEMBER 2, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Before: HON. HENRY F. WERKER, D.J.

New York, December 2, 1977;
11:00 A.M.

APPEARANCES:

BERMAN PALEY GOLDSTEIN & BERMAN, ESQ.,
Attorneys for Plaintiffs;
By: Robert G. Benisch, Esq., of Counsel.

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P.C.,
Co-Counsel of Plaintiffs;
BY: Stephen J. Smirti, Jr., Esq., of Counsel.

FRENCH, FINK, MARKLE & McCALLION, ESQS.,
BY: Robert J. Fink, Esq., of Counsel.

ROBERT F. FISKE, JR., United States Attorney for the Southern District of New York;
BY: Gaines Gwathmey, Esq.,
Mary E. Daley, Esq.,
Gerald Hartman, Esq.,
Assistant U.S. Attorney,

[2] CORPORATION COUNSEL FOR THE CITY OF NEW YORK
By: Theodore Gilbert, Esq.,
Nathan Ratner, Esq., Assistant Corporation Counsel.

LOUIS J. LEFKOWITZ, ESQ.,
Corporation Counsel of the State of New York;
By: Dominick Tuminaro, Esq.,
Arnold Fleischer, Esq.,
Assistant Attorney General.

[3] (Case called.)

THE COURT: Good morning.

MR. BENISCH: Good morning, your Honor.

The plaintiffs are here today prepared to proceed pursuant to the Court's direction of last Wednesday, and we are placing before the Court certain evidence which we believe will be an aid to the Court in determining this matter.

I would like at the outset to advise the Court that the Health & Hospitals Corporation, the Board of Higher Education of the City of New York and the Board of Education of the City of New York were served with the papers in this action yesterday.

I have and I will file copies of the receipts of service. We have brought those defendants in.

MR. GILBERT: I have not been informed or been requested by either of those agencies to appear for them as of this morning.

MR. BENISCH: While we are on that subject, your Honor, it is my understanding, although perhaps Mr. Gilbert can enlighten me, that the Board of Education of the City of New York is a City agency.

Transcript of Proceedings

MR. GILBERT: They are not a City agency. If the Board of Education has been served, we will [4] appear for them.

As to the Hospital Corporation and the Board of Higher Education, I cannot make that representation at this time.

MR. BENISCH: All right.

THE COURT: All right.

MR. BENISCH: Would you wish me to proceed to offer in evidence certain documents?

THE COURT: Sure.

MR. BENISCH: All right.

Your Honor, I would like to offer as Plaintiffs' Exhibit 1 the copy of the document entitled EDA Minority Business Enterprise Technical Bulletin, which I believe is published by the Federal Economic Development Administration of the Department of Commerce.

I will distribute this to counsel.

MR. GWATHMEY: The government has no objection to the admissibility of this document.

THE COURT: Have you indicated somewhere in the document as to what you want me to look at?

MR. BENISCH: Your Honor, if the Court please, I think perhaps the —

THE COURT: In other words, I am not going to plough through reams of papers to find out that you have [5] one paragraph in there that I am supposed to read.

Transcript of Proceedings

MR. BENISCH: I will be happy to do that, your Honor. I will mark it.

THE COURT: And let your adversaries know what you are marking.

MR. BENISCH: Yes.

Specifically, in Exhibit 1, to be marked, I am referring to Paragraph IV on page 10, and the pages which follow that paragraph, and the sub-paragraph entitled "Determination of Bonafide Minority Business Enterprise," which is under sub-paragraph II.

That begins at page 2 of the document.

THE COURT: Are there any objections from anyone else?

MR. GILBERT: No objection, your Honor.

MR. TUMINARO: No, your Honor.

THE COURT: It may be received.

(Plaintiffs' Exhibit 1 received in evidence.)

MR. BENISCH: I would like to offer Plaintiffs' Exhibit 2, a document entitled Guidelines For 10 Per Cent Minority Business Participation in LPW Grants. I believe, your Honor, that this again is a document put out by the Department of Commerce of the United States. I will [6] note that on the copy that I am offering it is the only one I have, and it has been underscored. At this point I would like to indicate —

MR. GWATHMEY: Excuse me. I have a clean copy.

I believe the document will be part of a package of material that we would file with our memorandum of law. If you have a problem with copies, you can await the arrival of the memorandum of law, which should be here shortly.

MR. BENISCH: Let's deem the clean copy marked.

MR. GWATHMEY: No objection. You can take the copy out of the material that I have already supplied to you. It is probably in there.

MR. BENISCH: The next exhibit that I would like to offer is the notice to bidders, which is the standard bid language which is being presently inserted into contracts let by the various agencies of the City of New York. This is the standard language, it is a sample and it is in blank because it has not been pertaining to any particular job.

MR. GILBERT: I have no objection, your Honor.

MR. GWATHMEY: Inasfar as the City is prepared [7] to stipulate that these are in fact the suggested provisions in the proposal, the government has no objection to them either.

MR BENISCH: They are not suggested. There [sic] are the provisions that the City is putting into its contracts and which are being submitted to the bidders.

MR. GILBERT: I will concede to that.

THE COURT: We will amend your statement to that extent. They are what the City insists be in the bids, is that correct?

MR. GILBERT: Yes. They are part of our bid documents.

THE COURT: Fine.

It may be received as Plaintiffs' Exhibit 3.

2 is the other document which we deemed marked in evidence, until you get us a clean copy.

Now, this is 3.

(Plaintiffs' Exhibit 3 received in evidence.)

MR. BENISCH: I will hand up a clean copy of Exhibit 2.

THE COURT: All right.

(Plaintiffs' Exhibit 2 received in evidence.)

[8] MR. BENISCH: I would now like to offer as Exhibit 4 the list of Public Works Projects submitted to the Economic Development Administration for Funding under Round 2 of the Local Public Works Capital Development and Investment Program. That is the Act that is before this Court — by the City of New York — which I am advised constitutes the list of projects which has been approved for Federal Funding under Round 2 of the Act.

MR. GILBERT: Yes. I supplied the document, your Honor.

THE COURT: Yes.

MR. GWATHMEY: Again, based on the representation of the City of New York, we have no objection to the admissiblity of the document.

THE COURT: All right.

MR. TUMINARO: No objection, your Honor.

(Plaintiffs' Exhibit 4 received in evidence.)

MR. BENISCH: Your Honor, at this point I would like to call to the stand Mr. Nicholas DiMenna.

[9] NICHOLAS DI MENNA, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENISCH:

Q. By whom are you employed, sir? A. I am employed by a construction company called Nicholas Di Menna & Sons.

Q. What's your capacity with that company? A. I am a vice-president.

Q. For how long a period of time have you worked for that company? A. Since 1963.

Q. Is that company engaged in the general contracting business? A. Yes.

Q. Personally yourself, do you hold any degrees or professional licenses? A. I have a degree in Economics from Manhattan College.

Q. All right.

Are you a professional engineer? A. No.

Q. Will you tell the Court, please, in general what Di Menna & Sons does, the type of work that they do? [10]

A. We are basically sewer contractors and we do most of our work here in New York City for the Department of Water Resources and we also do work for the Department of Highways.

Q. Do you also do some State work? A. No. We have worked in Connecticut, but we don't do any State work.

Q. That is the State of New York? A. Right.

Q. For how long a period has the DiMenna Company been in existence doing work for the City of New York? A. Since approximately 1930.

Q. Can you give us some idea, in the last five years, of the annual volume of work that you perform in the construction field? A. Well, normally in a normal time we would do 5 million dollars worth of work a year. But, the last two years we have done something less than that because of the economic problems of New York City.

Q. In other words, there has been less work? A. Yes.

Q. All right.

Has the DiMenna [sic] submitted any bids on jobs which are funded under the Public Works Employment Act [11] of 1977? A. Yes.

Q. Will you identify those jobs, please? A. Do you want the list of all the jobs that I bid?

Q. No. I will withdraw the question.

Have you been a low bidder on any of the jobs? A. Yes. We have been a low bidder on two jobs.

Q. Which jobs? A. One job was DWR 128, which was a construction of a regulator at the MacCombs Dam Bridge for approximately $296,000. We were awarded that job.

Q. What agency is that for? A. That's the Department of Water Resources.

Q. Was there a requirement in that contract? A. Yes.

Q. Was it MBE? A. About $36,000.

Q. When I refer to MBE it is the Minority Business Enterprise, under the Act.

What about the second job that you were a low bidder on? A. That was for the Department of Water Resources. [12] That was on 80th Street in Queens.

Q. How much was that job? A. That was $898,000.

Q. Was there an MBE requirement in the bidding documents for that job? A. Yes. There was. Do you want the amount?

Q. Yes. A. $88,700.

Q. Has the DiMenna Company or is the DiMenna Company also in the process of working up and preparing a bid for any jobs to be let? A. Yes.

Q. By the City of New York? A. Yes.

Q. Do those jobs or job contain an MBE requirement? A. Yes. It is one specifically that we are bidding, DWR 120, the Storm and Sanitary Sewers on 129th Street in Queens, and the requirement for the Minority Business Enterprise is $527,000.

Q. What is the amount that the engineers estimate on that job? A. They don't give you the engineers' estimate. But, they — I think the amount of the grant, if this is [13] supposed to be 10 per cent, it should be around $5,270,000.

Q. In connection with that Queens job, which you are going to bid — by the way, what is the letting date as scheduled? A. December 13th.

Q. For that contract? A. December 13th.

Q. That is a week from Monday? A. No. A week from this coming Tuesday, I believe.

Q. All right.

Are you personally involved in the preparation of the bid for that contract? A. Yes. I actually am the head of the bidding team and all the bids are prepared under my auspices.

Q. What, if anything, does that contract or the bidding documents for that contract provide with respect to naming and designating a minority business enterprise for the performance of work under that contract?

MR. GWATHMEY: Objection. If the contract is available, I think the document can speak for itself.

MR. BENISCH: The problem we have here, your Honor, is that there are one set of bidding documents and Mr. Di Menna has advised me that his estimators — who are currently working on the contract — must utilize [14] those documents. I do not have the contract book here today.

THE WITNESS: I have it here. But, I need it. You cannot keep it.

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MR. BENISCH: Excuse me. I misspoke.

Q. Are these the bidding documents? A. Yes. Right here. Do you want the section that applies?

Q. First, the document, which you hand me here, is the bid document for the job which you are going to bid on December 13th? A. Correct.

MR. BENISCH: I would like to offer this as Exhibit 5, your Honor.

MR. GWATHMEY: May I have a look at it, please?

Are you offering this document in the entirety or just with respect to a specific passage of it, which we could direct our attention to?

MR. BENISCH: I am offering it with respect to those portions, the specifications which deal with the MBE appointments.

MR. GWATHMEY: Would you get the witness to identify those and then in those circumstances we could have a meeting or voir dire or stipulate to the ad-[15]missibility of the document or object to it?

MR. BENISCH: With the Court's permission.

THE COURT: Yes.

MR. BENISCH: Perhaps we should have it marked for identification.

THE COURT: All right.

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(Plaintiffs' Exhibit 5 marked for identification.)

Q. Mr. DiMenna, will you identify or indicate in Exhibit 5 for identification which portions of that document refer to the MBE requirements on that job, and indicate the page numbers if possible? A. Yes. They are basically 5 through 13, Addendum 6. Those are these pages right here. I also have copies of them that I made up.

Q. Are there any other pages in here which relate to MBEs? A. I think there is another one that corrects the form for the MBE. That's back here. But, all that does is eliminate some of the information that we have to fill in concerning the MBE. Basically, this is it.

MR. BENISCH: For purposes of this offer I would limit the offer for Exhibit 5 to the pages indicated by Mr. DiMenna, which are pages 5 through 17 [16] of an addendum No. 6 in this book.

MR. GWATHMEY: May I have Plaintiffs' Exhibit 3, just for the purposes of comparing whether this is exactly the same thing.

(Pause.)

MR. GWATHMEY: No objection, your Honor.

MR. BENISCH: May I have it marked?

THE COURT; Yes. It is received.

(Plaintiffs' Exhibit 5 received in evidence.)

Q. Mr. DiMenna, will you indicate to the Court, please, what the bidding documents provide with respect to the MBE

requirements for the contractor on that job, that is, the Queens job to be let on December 13th? A. Right. They require that you sub out to a minority business enterprise approximately, at least $527,000 worth of work, or to a minority vendor.

Q. All right.

That is an organization that qualifies as a minority business enterprise? A. Right.

Q. Can you tell us generally and briefly what work is encompassed in this contract? In other words, what is the contract for, what are you going to build? [17] A. It is basically a monolithic sewer, a flattop reinforced concrete sewer, which is basically in the shape of a box. You excavate down 20 feet on the average depth, and you put in about 589 feet of a double-barrel, I think 15 x 8 sewer, and then there is another monolithic sewer, a couple of thousand feet of that. I think it is 8 x 8 foot 6. Then you backfill and then you restore the roads and the streets and the curbs and sidewalks.

Q. The monolithic sewer is being put or installed in an existing street? A. Yes. It is built in place. In other words, you dig down and put in the steel and you pour the concrete in place.

Q. It is within the alignment of an existing roadway? A. Yes.

Q. What portions, sir, of the work encompassed in this contract — if any — which you ordinarily sub out in the normal course of your business? A. The only work that we would sub out would be the restoration of the streets and the curbs and the sidewalks.

Q. Are you going to do that? Are you going to [18] sub out that work on this job? Are you planning to do that? A. Yes.

Q. Are you planning to incorporate into your bid prices the price, a subcontractor who is going to ultimately perform that street restoration work, if the DiMenna Company is the low bidder and awarded this contract? A. Yes. We are going to sub it out.

Q. Does your bid reflect that fact? A. It will reflect that fact.

Q. Is this type of work, which you have performed on other jobs as well? A. Yes.

Q. The street restoration work? A. We normally always sub out the street restoration work. We never do it ourselves.

Q. Do you have certain firms which you generally contact with respect to getting a price for performance of this street restoration work? A. Yes.

Q. What firms are they, sir? A. There is Willis Point; Mascalli; Eden Wald; Ariola (Phonetic). There are a few others that I [19] cannot remember.

Q. Are these firms generally known to be asphalt people? A. Yes. Highway contractors, yes.

Q. Because the restoration work you are concerned with is repaving the streets when you finish installing the sewers, is that correct? A. Yes.

Q. Have you been able to solicit prices from those subcontractors, the subcontractors that you named? Are each of them outfits which you have dealt with in the past on other jobs? A. Yes.

Q. Have you had satisfactory experiences with those outfits? A. Absolutely.

Q. Have you gotten reasonable prices from those outfits?

MR. GWATHMEY: Objection, your Honor. Mr. Benisch is leading the witness. It is perfectly all right for the background information, but in questions like this, I do not think it is proper.

THE COURT: I will sustain it.

Q. Will you tell the Court or describe to the [20] Court the criteria?

THE COURT: Mr. Benisch, when you get right down to the brass tacks of it, he has dealt with these people and he hired them as subcontractors. I don't have to know whether the prices have been reasonable or unreasonable. That is for some other body to determine when they accepted the bid, the low bid.

Q. Mr. DiMenna, have you been able to solicit prices from those subcontractors on this job? A. No. I am not going to.

Q. Why? A. Because in this particular job the only way I can comply with that requirement, the minority business enterprise, is to sub out that work to a minority subcontractor.

Q. All right. A. All the other work we will be doing a hundred per cent ourselves. It is impractical to sub out any of the other work.

THE COURT: I will ask Mr. DiMenna, do you supply the cement? Do you supply the shoring for the ditches and so forth and so on yourself?

THE WITNESS: No. We buy the concrete.

THE COURT: This area of the contract work is [21] not the only area?

THE WITNESS: It is —

THE COURT: As I see, the statute applies not only to work to be performed but also to suppliers, does it not?

THE WITNESS: Yes, your Honor.

THE COURT: MBE could be either one?

THE WITNESS: Yes. There are only four cement contractors, I mean four cement suppliers in New York. None of them are minority concrete suppliers.

THE COURT: That's what I wanted to find out.

THE WITNESS: The same with reinforcing steel. There are no minority reinforcing steel suppliers.

Q. None that qualified as MBE? A. Right.

Q. Are there any other items of substantial material —

THE COURT: Lumber?

THE WITNESS: Yes. On this job it will basically be steel sheeting.

Q. Are there any qualified MBEs who supply and furnish steel sheeting? A. Not unless Bethelehem Steel just recently sold their stock.

[22] Q. Who do you buy steel sheeting from? A. Normally from either Bethlehem Steel or Skyline or Stanhope or Foster.

Q. Is it fair to state, Mr. DeMenna, [sic] that there is no item of material supplied under this contract which you can reasonably let out or contract with in MBE?

MR. GWATHMEY: Objection. That is leading.

THE COURT: I will permit him to answer it. We don't have a jury here, you know.

A. There are other items, but they are so small. There is no way that there would be enough to comply with the $527,000.

Q. All right.

With respect to the street restoration work, are you going to let that out to a MBE? A. Yes.

Q. Where did you obtain the MBEs? A. Well, he had — when all that started, he has given me some prices on other jobs that I have bid on.

Q. Do you have a price from him on this job? A. No. Not yet.

Q. Do you know this MBE? Have you worked with him before? A. Never. No.

[23] Q. In the ordinary course of things, would you, but for the MBE requirement of the contract, want to work with this MBE who you are talking about? A. No. Because his prices have always been about 15 per cent higher than the other prices that I have received.

Q. Have you in the past, however, had occasions on other jobs to solicit prices be it from subcontractors or material suppliers, prices from companies, which would qualify as

MBE? A. Yes. In fact, we have used minority — a job we have right now, the reconstruction of the Harlem River Seawall, and one of my main suppliers is Mogoia Construction. He is a minority business enterprise, yes. He has about $400,000 worth of work with us.

Q. Is the DiMenna Company a member of the General Contractors Association of New York? A. Yes, they are.

MR. BENISCH: I have no further questions of this witness, your Honor.

THE COURT: All right. Gentlemen, do you have any cross-examination?

MR. GWATHMEY: May I have a minute to go over my notes?

[24] THE COURT: All right.

(Pause.)

MR. GWATHMEY: As a preliminary matter, I would like to move to strike the entire testimony as completely irrelevant. I do not know how it bears upon the issues put before this Court in any way. He has not alleged that he has been harmed in any way by the operation of this statute. I do not see where it takes us to have this material in the record.

THE COURT: I will deny your motion. I will retain the material on the record.

CROSS EXAMINATION

BY MR. GWATHMEY:

Q. Mr. DiMenna, I believe that you testified that your annual volume of work over the last five years was in the

neighborhood of $5,000,000 with the exception of the last two years, which it was slightly below that? A. Yes. Right.

Q. Can you give us a more specific figure as to the last two years? A. Well, I think that this year we will probably do about 3 million worth of work, and the year before that was approximately 2-1/2 million.

Q. Is your business exclusively with the govern- [25] ments of the City and the State of New York or one of those organizations? A. It has been exclusively with New York City, with their various agencies, and also with some towns in Connecticut.

Q. Have you worked on any other project where the money, which was supplied for construction of the project, was Federally-funded? A. Well, in the past we have done New York City jobs where they were all funded by New York City. I would say, I couldn't give you a percentage, but I would say the great majority of the jobs were Federally-funded. The only jobs we have had for the last two years have been Federally-funded.

Q. You testified, I think, that you were a l w bidder on two contracts? A. Yes.

Q. And that in both of those circumstances you procured minority subcontractors? A. No. Actually, I supplied — I mean, I am hiring a minority vendor.

Q. I see.

On the first contract which was DWR 128, did you seek out from a variety of companies bids for the services [26] which ultimately the minority vendor supplied to you? A. On that one, which is basically a construction of a tide date regulator, and we would not sub out any of the work on that at all. So, there was no reason to get prices from other subcontractors. That we will do all ourselves. In order to comply with that, we

are going to buy the mechanical equipment through Minority Construction Supply Company, which is not the way we normally would do it. In other words, normally we would buy that material from Coldwell-Wilcox in Connecticut. Instead, Minority Construction Supply Company is going to buy the equipment from them and we will buy it from Minority Construction Supply and pay about $5000 more than we normally would pay.

Q. When you submitted your bid to the City of New York, more specifically to the Department of Water Resources — A. Yes.

Q. — did your bid reflect that? A. Yes. It did.

Q. With respect to the Second Department of Water Resources contract, could you explain what aspects of that contract were performed by MBE? A. On that job we are also going to buy some pipe, [27] reinforced concrete pipe and soldier beams through Minority Construction Supply Company. We also, by the way, always use Brotherhood Minority Patrol, which are our watchmen and security on the jobs. The Minority Construct [sic] Supply Company, we are going to buy the concrete pipe, some of the concrete pipe from them and some of the, probably the soldier beams. That is not our normal supplier for those items. Again, the Minority Supply Company will go to our formal suppliers and buy the materials from them and then sell them to us.

Q. Again, in the bid which was submitted to the Department of Water Resources, your bid reflected that fact in the event that you were going to have to pay any price for those commodities? A. That's correct.

Q. You testified with respect to DWR 120? A. Yes.

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Q. You are contemplating using a minority enterprise concern to do certain work on the sidewall? A. The paving work primarily, yes.

Q. Have you entered into negotiations with that company? A. Not yet.

Q. As of this stage? [28] A. No.

Q. You have not. Have you conferred with them as to what their price will be? A. Usually with the subcontractors we don't get the prices till about three days before the bid time. In other words, they have only been out for maybe two or three days. They have to go down and look at the job and put their bid together. That will take time. They will submit prices to us, probably I would say next Thursday or Friday.

Q. You delivered them a copy of the plan? A. They usually buy it themselves.

Q. How is it that they realize that you are bidding as a prime contractor on this particular job? A. No. 1, in the Brown letters it is listed. They list all the purchases of all the plans and the specs. They have quoted me in the past on some of the highway work. They know that I am going to be bidding this job. I will call them up.

Q. Directing your attention to the past, do you recall when the first time was that they quoted you on a job? A. Well, it was when the first jobs came out, which would be about maybe three weeks ago.

[29] Q. That's the first time that they quoted you a bid on any project to your knowledge? A. Yes. Right.

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Q. When you — A. That particular company.

Q. When you referred to these jobs, you are referring to jobs which have developed under the present Act, the Public Works Employment Act of 1977? A. Yes.

Q. What was the project three weeks ago that they quoted you a bid on? A. Well, I know there was one a couple of weeks ago. On Bell Boulevard we got a quotation from them.

We got a quotation from them on Baisley Boulevard, which was a monolithic sewer in Queens.

Q. Did you submit a bid on the work? A. Yes. I did.

Q. Were you successful in that bid? A. No.

Q. You were not? A. I think I was fourth.

Q. Did your bid incorporate the bid which you in turn had received from this MBE for work on the monolithic sewer? [30] A. Yes. It did.

Q. Can you remember any other instances other than this one that you have described some two weeks ago on the monolithic sewer concerning a particular MBE? A. That was —

MR. BENISCH: Objection to a further line of questioning here. It is going beyond the subject covered on direct examination. We are getting into contracts which the witness has not testified to on direct examination. We are getting into contracts which the witness has not testified to on direct.

THE COURT: I am not going to limit you to specific contracts. I will let him go ahead for a short while.

A. Do you want me to continue on that job?

Q. Yes. A. That was also a monolithic sewer as this job here is, and we had the same problem there as we do on this job in that we were unable to give any subcontractor — you know — we couldn't buy any of the materials from any minority, like for instance the Minority Construction Supply Company in this particular instance, because it was a monolithic sewer, which we are pouring in place, which we do ourselves. That job, like [31] this job, the only thing we could sub out was the highway work.

Q. You say that you weren't successful on that job two weeks ago? Do you know who was successful? A. Catapano, Andrew Catapano.

Q. Did they have MBE participation in their project, to your knowledge? A. How would I know that? I am not privy to their bidding documents. I just hear the amount that is read off. I am sure, if they got the award they would have had to have been.

Q. With respect to this job two weeks ago, did you ask anybody else for bids on it to perform the work? A. Yes. We had about three other, three or four other highway contractors that gave us bids on that. They were all lower.

Q. They were all lower. You did not submit those bids because of the fact that this was a Minority Business Enterprise, and you accepted their bid? A. Right.

Q. Did your price that you quoted to get the contract reflect that additional cost? A. It had to.

MR. BENISCH: Objection. I do not believe [32] that the contract that they are referring to was gotten by the DiMenna Company, if I am not mistaken.

MR. GWATHMEY: I did not mean to indicate that it was.

Q. How many MBEs did you get bids from in that particular instance? A. I think two. But, I am not all that sure. There are not that many Minority Business Enterprises that do highway work. I mean of that nature and that size.

Q. If you got, that would make a total of three? A. Pardon?

Q. If you got two others, that would make a total of three? A. I meant two in total.

Q. All right.

Presumably, since you testified before that one, that all were lower than the one you ultimately selected, why didn't you select the one that was lower than this one? A. I still —

Q. Than the MBE? A. I picked the lowest MBE, but he was — the lowest MBE was higher than the other regular contractors.

[33] Q. Did you have any other contract between the one we have been discussing and the one that you testified about, to wit, DWR — I am sorry, DWR 120? A. 120, that's the one.

Q. That's the current one? A. Yes. That's the one we are going to bid on on December 13th.

Q. Have you had any other contracts on which you sought MBE participation, other than the one you testified to just recently? A. The one we got, the DWR 115. That was 80th Street in Queens. That was combined sewers, grading and paving. That was basically a sewer pipe job.

Q. How long have you been associated with DiMenna & Company or DiMenna & Sons? A. Since 1963.

Q. In 1963 what was your job? A. My job?

Q. Yes. A. I was a carpenter's helper.

Q. When did you become an executive officer or a managerial employee of some type with the company? A. I would say I went out of the field and into the office about maybe 1968 or 1969. I don't really [34] remember.

Q. During the period that you have been a managerial employee, can you testify for us as to the instances in which you have had — withdrawn.

Can you testify for us of the instances in which you have let or sublet contracts to Minority Business Enterprises?

MR. BENISCH: Objection, your Honor. We are now going way back and we are beyond the scope of direct.

THE COURT: I will sustain it.

Q. During the business down-turn, which you have referred to, was it necessary for your company to lay off any employees? A. Yes. We went from a company that primarily hired about 150 people to a company that hired about 30 to 40 people.

Q. Are you familiar with the racial composition of the work force of your company? A. Absolutely.

MR. BENISCH: Objection, your Honor. We are getting now into racial compositions, which is not covered by the Act. The Act is talking about Minority Business Enterprises.

THE COURT: Yes. Sustained.

[35] Q. With respect to, I believe, the three contracts that you have testified to, where you had dealings with MBEs, could you state what efforts you made to determine what companies there were available that qualified as Minority Business Enterprises? A. Yes. In the specs there is, they tell you if you call — I believe it is the Department of Commerce — no, the Office of Minority Business Enterprises, which is headed up by Mr. Hudnell, they will give you a list of MBEs. We did, and they sent us a list of approximately 140. I called 70 and my brother called 70. In fact, that's where we got the Minority Supply Company from, we got it from that list.

Q. Out of the 140 that you telephoned, how many affirmative responses did you get with respect to your request for a response to your proposal? A. Three.

MR. GWATHMEY: I have nothing further, your Honor.

THE COURT: Mr. Gilbert, do you have any questions?

MR. GILBERT: Yes, your Honor.

[36] CROSS EXAMINATION

BY MR. GILBERT

Q. Mr. DiMenna, absent of contracts or contract proposals that required your company to use Minority Business Enterprises, how many Minority Business Enterprises has your company utilized? A. In what time frame? In the last year we used two. We used, before this requirement we have the job, the reconstruction of the Harlem River Seawall, which was not in this job. We had Brotherhood Minority Patrol, which did the security. We had Magoia Construction, which is doing the paving and the sidewalks.

Q. That's on that one job? A. Yes. That's the only job we have.

Q. Prior to that during the history of your company, how many minority business enterprises have you used?

THE COURT: In the history of the company?

MR. BENISCH: Objection.

THE COURT: He is not that old. During the last five years, maybe.

Q. During the time you have been connected with the company in an executive capacity or five years.

THE COURT: The last five years.

Q. Would you answer his Honor's question?

[37] MR. BENISCH: Objection to the question, your Honor.

THE COURT: No.

A. The last five years, I will have to think. I would say two.

Q. That's the two you referred to? A. Yes.

Q. All right. A. Not including these jobs that we just got.

Q. I understand that. That's the two on that one seawall job. During that five-year period, could you tell us approximately how many contracts were jobs your company performed. A. In the last five years?

Q. Yes. A. Well —

THE COURT: Your best estimate.

THE WITNESS: Yes.

A. I am trying to do that. I would say that it was maybe five or six.

THE COURT: In the last five years?

THE WITNESS: Yes. We are a small company. We usually bid jobs that are in the range of four to five million dollars. If we get one, five million dollar [38] job, that's it.

THE COURT: For the year. All right.

Q. Can you tell us, or the job, not funded by the local public works program, but the seawall what the dollar amount of your contracts would be with the minorities — A. The dollar amount?

Q. Yes. Could you tell us? A. It is between 300 and 400 thousand dollars.

Q. Could you tell us the gross amount of your contracts during the five-year period? A. The gross amount? It is rough. I would say —

Q. Approximately. A. 20 million. I do not know.

Q. During this same period? A. Maybe less. 17 to 20 million.

Q. During this same five-year period could you tell us the dollar amount, approximately, of all your subcontracts? A. Oh, boy. No way. I would be giving you a ridiculous answer. I couldn't —

THE COURT: I will sustain my own objection to that question.

MR. GILBERT: No further questions.

[39] MR. TUMINARO: I have no questions.

REDIRECT EXAMINATION

BY MR. BENISCH:

Q. With respect to the pipe supply, the tidegate supplier when one of the jobs — the McCombs Dam Bridge.

I believe you testified that he is acting more or less as a broker between your company and the company Coldwell-Wilcox? A. Correct.

Q. Is that supplier doing any work at all with respect to the acquisition of that pipe, those tidegates? A. I am sure that he will process the purchase order end, which we gave him. I would imagine that most of the stuff that he would do would be paperwork. To what extent —

THE COURT: Is the supplier the manufacturer?

THE WITNESS: The supplier that we — Coldwell-Wilcox —

THE COURT: They are the manufacturer?

THE WITNESS: They usually manufacture. Some of the stuff they have independent people doing some, and then they package them.

THE COURT: Your current supplier, however, has no facilities for this, is that right?

[40] THE WITNESS: That's right. No. Yes. He does not do anything.

THE COURT: He does not manufacture anything?

THE WITNESS: No.

THE COURT: All right.

BY MR. BENISCH:

Q. He is simply a go-between, between you and the manufacturer? A. Yes.

Q. Was it your testimony that were it not for the MBE requirements in that contract, you would not be operating in that fashion? A. I would go directly to Coldwell-Wilcox.

Q. With respect to the contract, which you are about to bid on on December 13th, will you tell the Court what if any effect the MBE requirement of that contract is having on your bidding procedures? A. In that particular one, I will be unable to use my normal highway contractors that I have a great respect for. We cooperate and we work together on a job.

I am going to have to hire someone that I never worked with before in my life.

THE COURT: This is completely repetitious. I will cut you off if you continue in this way. We [41] understand what the picture is.

Q. On the job which you are about to bid on, I believe you testified that there was a 500 — 27,000 requirement.

I believe you said that there was $27,000 requirement.

Does the specifying of that figure in the bid in any way inhibit your operations, your normal operations with respect to obtaining prices or shopping prices with your subs, if you are the low bidder? A. Absolutely.

MR. GILBERT: Objection.

THE COURT: I will sustain it.

Q. Will you tell the Court what if any impact or effect the designation of the specific MBE price has in your contract on your business operation?

THE COURT: It's been asked and answered. If I were you, sir, I would sit down and let this witness go. You are not going to prove through his mouth the general overall picture. As I read him, he is a rather specialized general contractor. Unless you have something that's very vital, I would release the witness.

MR. BENISCH: Your Honor, I believe if I could just get an answer to that question.

[42] THE COURT: I said that he cannot answer it.

MR. BENISCH: I have nothing further.

MR. GWATHMEY: Nothing further, your Honor.

MR. GILBERT: Your Honor, I had one question.

THE COURT: I said that before and you asked 20 questions. The witness is excused.

(Witness excused.)

MR. BENISCH: The plaintiffs call Mr. Frank LoCurto.

[43] FRANK LoCURTO, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENISCH:

Q. By whom are you employed A. Frank Mascali Construction Co., Inc.

Q. Will you tell the Court generally the type of work that the Mascali Company performs? A. We are primarily highway contractors in heavy construction, and we own two asphalt plants, which means we are in the paving business also.

Q. For how long a period of time have you been involved in the construction business with the Mascali Company? A. 28 years.

Q. Were you involved prior to that time with any other company? A. With the City of New York for one year.

Q. What is your present position with the Mascali Company? A. I am the president of the company.

Q. How long have you held that position? A. 11 years.

Q. Do you have any licenses or degrees? [44] A. Yes. I have a Bachelor of Civil Engineering out of the College of the City of New York, I am a professional engineer licensed by the State of New York to practice engineering in this State.

Q. Can you tell me, sir, the approximate annual volume of business that the Mascali Company has performed in the last five years? A. Well, we are averaging somewheres between 15 and 20 million per year with the exception of the two bad years.

Q. Which were what years? A. 1974 and 1975, I believe.

Q. But, for the year 1976, did you average that amount? A. In 1976, yes. Yes, we did.

Q. Has the Mascali Company bid on contracts let by the City of New York which contain a MBE requirement? A. Yes. We have.

Q. Has the company obtained or been the low bidder on any of those jobs? A. We have been the low bidder on five contracts.

Q. Have you been awarded any of those jobs? A. None. We have been notified on three that we have participated a low bid, verbally notified on the other [44] two. But no awards have been made yet.

Q. Are there any Act-funded jobs which the Mascali Company is presently preparing bids for? A. Yes.

Q. Which jobs are those? A. There was one job going in this Monday, which is Monday, December 5th, and that job would be the McDonald Avenue job in Brooklyn.

Q. Would you describe to the Court generally what that job entails, what work it is? A. It is a street job basically. It involves the replacement of the curbs and the sidewalks and the excavation of the street bed itself, including the removal of trolley tracks and restoring the concrete base and resurfacing it with asphalt and any peripheral work or anything that goes along with the contract.

Q. I am showing you a document and I ask you if you can identify that, please. It is a copy. A. It is a portion of the bid documents of the job that is to be let Monday, December 5th, which is McDonald Avenue.

Q. Is that portion which you have before you the portion of the bid specifications, the bid documents which pertains to the MBE requirements on that job? [46] A. Yes. They are.

MR. BENISCH: May we offer that as Exhibit 6?

THE COURT: Is there any objection?

MR. GWATHMEY: May I look at it, your Honor, please.

(Pause.)

MR. GWATHMEY: With the notation that it is a partial document, we don't have any objection to it. It does not purport to be the entire document.

THE COURT: It is only with respect to the MBE. I will receive it.

(Plaintiffs' Exhibit 6 received in evidence.)

Q. With respect to this McDonald Avenue job, which you are bidding on, there is an MBE requirement, is there not, in the bid documents? A. Yes. There is.

Q. What is your company going to do with respect to complying with those MBE requirements? A. Well, I am entertaining a series of MBE companies at the present time, and I will have to use one of the MBEs that I have not used on other contracts that I have been successful with.

Q. What type or what aspect of the work on this [47] McDonald Avenue job lends itself to being subbed out?

MR. GILBERT: Objection.

THE COURT: I will let him answer that.

A. Normally, in a job of this nature there are water mains which is a specialty item in our firm. So we will sub-contract that work out.

Q. Could you find a qualified MBE firm to do that? A. Not to date, no.

Q. What other? A. Secondly, there is the planting of trees, which usually goes to a landscaper, and thirdly, the highly specialized work, which is the electrical work. The reason I say that it is highly specialized is because, as it is electrical work it is specialized to begin with. But there are so many electrical contractors in the City of New York that are not interested, or they are not geared to do the work in the streets. In other words, they can, let's say, wire up a building or possibly do plant work, but we are now physically working in the streets of New York where we are installing conduits for street lighting and conduits and cables to activate fire alarms, and also traffic signalization. This, within the electrical field, is supposedly highly specialized so that there are only four or five contractors that [48] we do business with.

Q. Are any of those contractors MBE? A. No.

Q. Are there any MBEs to your knowledge who would be capable of performing that electrical work that you are talking about, to your knowledge?

MR. GILBERT: Objection.

THE COURT: Ask him if he has a list of MBEs.

Q. Have you obtained a list of electrical contractors who qualify as MBEs from any source? A. I have gotten them just like any other contractor, from the office of Minority Business Enterprises, and I have a list in our possession.

Q. Have you so listed the MBEs on that list? A. The entire 143?

Q. Have you received any affirmative response regarding this work on this job for any of those MBEs? A. We did get quite a bit of response and interviewed quite a few people and we showed them the plans and the specifications and the requirements. They declined to give us a quote, only because it was beyond their facility or beyond their acapabilities [sic].

MR. GWATHMEY: Objection, your Honor. That is hearsay. I move to have it stricken.

[49] THE COURT: It is his opinion.

THE WITNESS: It is not my opinion, your Honor. It is what they told me.

THE COURT: If it is what they told you, then you cannot say it. It must be stricken.

MR. BENISCH: All right.

Q. What other aspects of the job, the MacDonald Avenue job work, are you going to entertain or use for purposes of complying with the MBE? A. Excuse me. Would you repeat the question?

Q. What other aspects of the McDonald Avenue job work are you going to utilize for purposes of complying with the MBE requirements of the bid? A. Generally our firm performs with the exception of those subcontract items that I have spelled out, we perform each and every one of the items on the contract. There are times when we sublet sidewalk and curbs, that is the installation of the street curbs and the sidewalks.

Q. Do you have —

THE COURT: Let him finish the answer.

A. I am presently only — I then look to sublet some sidewalks and curbs, which I have done in the past, only because the sidewalk and curbs are, they are the time-[50]consuming work, the time-consuming portions of the contract. Naturally, our company takes pride in trying to always finish jobs way ahead of schedule, so we ask for — we supplement our forces with the subletting of the sidewalks and the curbs.

Q. Are you going to do that on this job? A. On this job, I am proposing to do that, yes.

Q. By the way, what is the MBE requirement on this McDonald Avenue job, which you are bidding on Monday? A. It is around $329,000, if I remember that figure correctly. 329,000.

Q. It is close enough.

MR. BENISCH: It is 329,381.

THE COURT: I am sure that it is not going to make an iota of difference.

Q. Have you or does the company or has the company had other instances where it sublet out your sidewalk and curb work on other jobs? A. Yes.

Q. Do you have certain contractors who you traditionally used to perform that subcontract work? A. Yes. Over the past 10 years I have used primarily two excellent sidewalk and curb contractors.

Q. Have you an established business relationship [51] with them? A. Yes.

Q. Are they capable and qualified contractors? A. They are qualified. They are reliable and they perform work in a satisfactory manner.

Q. Would you use them on this job? A. Absolutely. For this job, I would, yes.

Q. Are you going to use them? A. No.

Q. Why not? A. Since I have to sublet $329,000 worth of work to MBE, it is impossible to sublet any work in the asphalt paving field. The reason for that is because there are non-existent, no MBEs that can qualify to do the asphalt work. If they were, they would become general contractors just like us. Our company has been in business next year 50 years.

MR. GILBERT: I will move to strike that testimony. It is conjectural.

THE COURT: It may be stricken.

Transcript of Proceedings

Q. My question to you, sir, is why are you not going to use your usual subcontractors?

THE COURT: The curb and sidewalk.

Q. On the McDonald Avenue job. [52] A. I am not going to use my regular sidewalk and curb people because I intend to sub this work out to a MBE.

Q. What is the basis of your intention, is it the requirement of the contract? A. Because of the requirement of the contract. The only way that I can comply with this contract is, I found, this is the only area that I can sub out because the other area, the other items of work are impossible to sub out.

Q. Have you solicited any MBEs with respect to the performance of this work, solicited prices from? A. Performance of which work?

Q. The curb and sidewalk. A. Yes.

Q. Have you obtained prices from them? A. No.

Q. When will you normally, in the course of business, obtain prices from this fellow, this MBE? A. I do not think that I will ever get prices from them. I will use my prices — were the best that I can do, and if I am successful like the other five that I have where I have used MBEs and I have no firm quotation on them — when the time comes I will award them the contract [53] based on agreements that I have made with these MBEs.

Q. Are you going to subcontract or pay this MBE for the curb and sidewalk work $329,000? A. I have to pay a minimum of that much. I have to spend a minimum of $329,000.

Transcript of Proceedings

Q. Does 329,000 cover, or is it a reasonable cost of performing the sidewalk and curb work on the contract? A. No. It is not. I think on this particular job — and we have not thumbed it up — I have not spoken to the engineers. I suspect that the sidewalks and curbs could possibly be a greater amount that the $329,000.

Q. Have you solicited in the past any MBEs in the past — and I am speaking about in the last three or four years — have you had occasion on jobs which you have bid to solicit funds which would qualify as MBEs under the Act, to perform work on the various contracts? A. Do you mean contractors who would be termed as MBEs now, but say four or five years ago were not?

Q. Yes. A. Yes. I think that Nick mentioned the same contractor we used, which is the Brotherhood Patrol Service. Magoia. I have used them. I have also had [54] quite a bit of work with L.B.Griffin. Lou Griffin is an excavator, and I used him repeatedly. But at the time I did not use Mr. Griffin because he was a minority or whatever — but his price was right and he knew what he was doing.

Q. Is that the determining factor with respect to who you subcontracted the work out to, for the price? A. Of course. You get the lowest qualified man that can perform the contract, absolutely.

Q. Is the Mascali Company, as the result of the MBE requirements in this contract on McDonald Avenue, being required to pass over its normal non-MBE contractors in bidding its job here? A. Absolutely.

MR. GWATHMEY: Objection. Leading, your Honor.

THE COURT: I will let him answer it. It is fairly obvious from what's gone on before.

MR. BENISCH: Nothing further, your Honor.

THE COURT: Cross-examination, please.

(Pause.)

THE COURT: This hearing is going to take six months if we do it at this pace. When I say cross-examination, I do not want you to waste time.

[55] CROSS EXAMINATION

BY MR. GWATHMEY:

Q. I believe you testified that you were the low bidder on five contracts but none of those contracts have been awarded yet? A. Yes.

Q. It was still awaiting the return of the bids on those? A. I do not understand the question.

Q. Your bids are still under consideration on those contracts? A. On three they notified me in writing that I precipitated the low bid, and that they intended to award. But no award has been made on any of the five.

Q. In each of those contracts you have participation by a MBE? A. Yes, I do.

Q. In each of those contracts the participation of the MBEs is reflected in your contract price, is that correct? A. Yes.

Q. With respect to the electricians that you spoke to, approximately how many came in to talk to you? A. There is one electrical contractor that was [56] fairly interested in first

coming into the streets. There are no Minority Business Enterprises at the present time who are electricians and who can perform work in the streets of New York. There are none. There was one — Electroque, I believe that was it — considering submitting a price to us. I tried to entertain them. I have also experienced a very serious problem in the electrical field, where out of the five or six contractors that are presently doing this type of work, four of them are in Chapter XI.

Q. Are you aware of the regulations under the Act which permit the grantee to seek an exemption on the basis of the fact that — A. Yes, I am.

Q. Did you make any effort to get in touch with any of the grantees on these particular contracts? A. I talked to the Highway Department through the General Contractors Association, and I understand it was denied or refused.

Q. Who exactly did you speak to with respect to your request that you seek an exemption or that the grantees seek an exemption in this particular case, and what did you say to that person? A. At the particular time?

[57] THE COURT: Please, this is irrelevant.

MR. BENISCH: Objection, your Honor, that is irrelevant.

MR. GWATHMEY: Your Honor, I asked him a question and he said that he spoke to someone in the General Contractors Association, and then he offered either a hearsay response or an opinion that his application was denied.

MR. BENISCH: Objection to the initial question. I move that it be stricken.

THE COURT: I am only saying that this last question is completely irrelevant. Let's get on with it, please.

Q. With respect to the sidewalk work, which you are presently attending the contract at to a Minority Business Enterprise on the upcoming McDonald Street Project, does your bid presently reflect the fact that you may experience some increased costs as the result of that? A. Well, I am going to answer that question by what has happened already. I have at the present time, I am being considered for five contracts. I have used five minorities and I am low. None of any of these jobs that I have, have I gotten a firm quotation from an MBE. They were not, either not capable, only because of the [58] extraordinary type of work that it is. It is very unusual. They have not been exposed to it. As the result of it, when I insisted on getting prices — and a beautiful example is the Wherewind (phonetic) in Manhattan. Generally my subcontractors give me a price for sidewalk as maybe $1.50 or $1.65 per square foot. It is a question. Since there is a tremendous volume of sidewalks, when we are talking about two or three pennies per square foot, we are talking about a considerable sum of money because the volume is great. You are talking about three or four hundred thousand square feet.

In order for me to prepare a bid, I try to get a firm quotation from my MBEs. I have not been able to get a firm quotation. In one particular case, Hannibal Demolition-Construction, which I have used, has not laid sidewalk now in ten years. He has lost touch. He does not know, he did not know what the union requirements were, he did not know where he can dump the concrete. That is initially when you replace it. He was not cognizant of many factors involved that would precipitate a price. One lad gave me a price of .32. It is obvious, we know that it is worse [sic] between $1.50 and $1.60. The man gives me a .32 price, so it is obvious that he could not even buy the concrete for that price. So, I am getting [59] concerned.

Another lad comes in and gives me a price of $40.50 square foot. Where do I fit?

What do I do? So, I plug in somewheres between $1.50 and $1.60, which is what we have been doing for the last two or three years, with a slight escalation cost of maybe concrete or labor or rates, depending on the time of the year.

This is what I have done with the five contracts that I have precipitated. There [sic] are really my numbers. I am asking the Minority Business Enterprise to accept those.

I hope he can come out right. I know I can do it with that, and make money. But, I don't know if he can do it. So, therefore, I have to give him an open-end contract and say, "Go out there and try and if you fall on your face I will come in and help you."

Q. You, in fact, have given open contracts with respect to these five bids that you presently established a low bid for? A. Yes.

Q. It is your intention to do the same thing with respect to the 6th bid that we are talking about? A. Yes. I could get hurt in the future if they [60] fall on their faces. I do not know. I have to do it in order to survive.

MR. GILBERT: Your Honor, I move to strike what could happen.

THE COURT: Yes. Just answer the question.

THE WITNESS: All right.

Q. I really don't believe that you have answered the question. The question was, whether your bid price reflected any

anticipated increase in cost, which you thought you might incur as the result of these contracts? A. No. On the five contracts that I have bid, no. I used as a cost the cost that my firm —

THE COURT: We have been all through this.

MR. GWATHMEY: Nothing further, your Honor.

THE COURT: Mr. Gilbert, do you have any questions of this witness?

CROSS EXAMINATION

BY MR. GILBERT:

Q. Sir, over a five-year period, outside of the contracts that you have bid on that were funded by the local Federal Public Works Act, could you tell us approximately how many jobs you have obtained over a five-year period? A. I would say about 125 jobs. We average about 25 or 30 jobs a year.

[61] Q. Could you tell me the gross, approximately the gross value of those jobs? A. It has to be in the vicinity of 60 to 80 million.

Q. Could you tell me in the same five-year period, again absent of the local Federal Public Works jobs, how many subcontractors you have used approximately? A. How many subcontractors?

Q. Correct. A. That is a very a difficult question. I am just guessing. Rather than just guess, it is difficult, unless I refer back to the —

I do not see how I can answer that. How many subcontractors, 10 or 15 maybe. That's purely a guess.

Q. Out of the 10 to 15, again absent the Minority Business Programs, how many minority contractors have you used? A. About four or five.

Q. Could you tell us the dollar value, approximately, of your subcontracts during this five-year period of time? A. This is purely a guess. I am guessing at 15 or 20 million, maybe.

Q. During the same period of time, could you tell [62] us the dollar value of the minority contractors that you employed? A. There is one very unusual job, but I would have to say very close to about 40 per cent of that, which would be of the, which would be about five to seven million dollars.

Q. Thank you.

THE COURT: All right.

MR. TUMUNARO [sic]: I have no questions.

REDIRECT EXAMINATION

BY MR. BENISCH:

Q. The outbids which you said were in Chapter XI, the electrical contractors, were they MBEs or none? A. None MBEs.

Q. Are you a member of the General Contractors? A. Yes, I am.

Q. The Mascali Company? A. Yes. Frank Mascali Construction.

MR. BENISCH: Nothing further.

THE COURT: I would like to know how much more you have?

MR. BENISCH: Your Honor, I do not believe that I have any more. This will constitute the offer, the testimonial phase. I have one more offer of proof, which [63] I would hand up now, which is a list from Mr. Hudnell's office of the Minority Business Enterprises maintained by the office of Minority Business Enterprises and the City of New York.

THE COURT: Is there any problem with that?

THE COURT: We will mark that as Exhibit 7.

(Plaintiffs' Exhibit 7 received in evidence.)

THE COURT: Do you gentlemen have any witnesses?

MR. TUMINARO: Your Honor, had [sic] the Commissioner, but he had to go to a luncheon appointment. We have not had a chance for the United States Attorney to confer with him. I am afraid that that is basically the situation. We had him here in the courtroom this morning. He left at about one hour ago. I am not sure if —

THE COURT: He has an early lunch. I have another matter which we started yesterday that I would like to get on this afternoon. How long do you anticipate that the Commissioner might take? Is he going to be back this afternoon?

MR. TUMINARO: He said that he might be able to get back down here. Mr. Gwathmey has not had a chance to [64] talk to him yet, as I said.

THE COURT: That is what we will call tough.

MR. TUMINARO: It is tough on one day's notice, your Honor.

THE COURT: That's true. I am under the same gun, you know.

MR. TUMINARO: We appreciate that.

THE COURT: I would suggest that we get the Commissioner back here at 3 o'clock this afternoon.

MR. GWATHMEY: Your Honor, I would like to say that there are a variety of documentary exhibits which we would like to get in which are presently unavailable to us. In the space of the day that we have had, we simply have not been able to put our hands on them.

THE COURT: When will you be able to?

MR. GWATHMEY: I am sure that they will be here next week some time.

MR. TUMINARO: Is it possible to have an adjournment at this point until Monday? I do not know your [sic] schedule is like, your Honor. That would make things a lot easier for everybody.

MR. BENISCH: Your Honor, I have the application for the temporary restraining order, the preliminary injunction pending. As the witnesses indicated this [65] morning, there is a job going to be bid on Monday.

MR. GWATHMEY: Your Honor, I think that I can address the appropriateness of the injunctive relief in these circumstances quite adequately. We have a billion dollar Federal

statute here, which the plaintiffs are asking you to enjoin the operation of on the basis of testimony by two witnesses, which, as I understand it, does not allege that they have been damaged in any way by the operation of this statute. They seem to be saying that they object to the fact —

THE COURT: From what they have said, it is pretty well indicated that the public may have been injured by it.

MR. BENISCH: The taxpayers.

MR. GWATHMEY: I think that it is clear that the government is free to spend its money the way it wants to.

THE COURT: The government is nothing but the people of these United States. I hope that some day, some United States Attorneys will find that out.

MR. GWATHMEY: I understand that, your Honor. I think if the legislators will determine that they wish to expend its money in its [sic] way, then that's a legitimate goal. That in fact is precisely the situation.

[66] THE COURT: It is not a legitimate goal in my opinion to incorporate a Welfare program in a Works Project. I am going to be in recess in this matter until 3 o'clock. I will expect to see you back here. Tell me where you are then. Tell me what your problems are with your documents, whether you can get them and where you can get them and so forth and so on.

MR. BENISCH: Your Honor, are the defendants going to produce Mr. McNamara as a witness or not?

MR. TUMINARO: We will try to produce him. I do not say that we can tell you that right now. We will try to get Mr. McNamara here at 3 o'clock. But, beyond that, I cannot say that he is going to be here at 3 o'clock. I have to locate him.

THE COURT: How does the Commissioner like working on Saturdays? Can you bring him in here tomorrow morning? Think about that. All right.

(Time noted: 12:30 p.m.)

[67] THE COURT: I am sorry to keep you gentlemen waiting. We had some fairly important business to do on the otherside.

MR. GWATHMEY: Your Honor, I would like to make a brief argument in support of the motion by the Government to dismiss the application by the plaintiffs for a preliminary injunction in this proceeding.

THE COURT: All right.

MR. GWATHMEY: I think it is imperative to begin consideration of such a motion with the discussion of what plaintiffs have shown in terms of irreparable injury or injury in fact here. We have had two witnesses who have appeared in this proceeding, on [sic] of whom testified to the effect that he had a number of contracts on which he had passed through his increased costs to the government of the United States. The second witness in the proceeding testified that he had achieved the low bid in five contracts under the program and statute here in issue, and further testified that as yet he has experienced no damage and in reality doesn't anticipate, can not anticipate with certainty, any damage in this proceeding. This is a Federal Statute designed to pump into the economy some four billion dollars in federal funds on an expetited [sic] basis.

[68] The purposes of the statue [sic] are stated in the legislative history, and they are to alleviate unemployment in the country, a problem which Congress deemed to be of critical

importance throughout the legislative term and to stimulate the economic growth in the industry in general and the contruction [sic] industry in particular.

A further factor was to build vitally needed or needed public works projects which had been sitting idle for a number of years. The objective of the statute which was passed by an overwelming majority was to alleviate social ills rapidly.

Accordingly, Congress got the expetiting [sic] procedures. Any delay which causes those expetiting [sic] procedures to be put over obviously functions as a great detriment to the public interest.

Moreover, funds allocated under this program, unless construction begins in the project for which they are allocated within the ninety days, are subject to recall. They are also subject to recall if construction or work on the project does not begin by December 31st, 1977.

Now this program as I have described it could be compared to the welfare statutes of the '30's which the Court is well familiar with. We can conceive no congressional or no constitutional infermity [sic] in any statute which is [69] based on the premise that it is designed to alleviate social ills. We note in passing that this statute does contain provisions which are designed to prevent the gross waste of money.

First of all, there is a provision which governs the pass through of certain expenses in the circumstance where a minority contractor does no more than act as an agent for a supplier to the prime contractor. I believe we heard an instance of a possible application of that, here today, although the facts weren't developed sufficiently to warrant any such conclusion. But there is a provision expressly in the regulations under the

statute which says that where the minority business does no more than act as an agent in getting whatever it is that is to be supplied to the prime contractor, then the only thing that is attributable to the MBE expense level is the amount of commission which he can legitimately charge on that.

A second factor which the regulations contain is the design to prevent the waste of money as the provision which allows the Secretary to waive the application of the ten percent minority set aside.

In the circumstance where there is a finding that no minority is available to perform the work which the prime contractor is attemting [sic] to perform, there are[70] procedures set out for the granting of the project to make application for that. They are adequately described in the papers by the parties here, I believe.

I wish to reemphasise [sic] however that in an application for a preliminary injunction the weighing of the public interest and in this case the public interest which we consider to be compelling against the showing in this case of a private interest, which in fact is no showing at all, but even if it were we would agrue [sic] it would not be sufficient to overcome the public interest, is something which the Court has to address very seriously before entereing [sic] into any preliminary injunctions. I just would like to briefly move on to a discussion of the constitutionality of the ten percent minority set aside in addition.

The legislative history —

THE COURT: As I understand it this is contained in your papers.

MR. GWATHMEY: Yes.

THE COURT: I will have to read the papers in any event.

MR. GWATHMEY: I will pass over that and I will move to the final point.

THE COURT: I understood that you had a witness.

MR. GWATHMEY: May I make one more request of you?

[71] THE COURT: I would suggest that we get the testimony on the record. Our court reporters have been working all day and I would like to give them an opportunity to go home and rest. We are going to work tomorrow too.

MR. GWATHMEY: I understand that. Before the government proceeds with a presentation of its case, it is imperative that the government realize what it is we are conducting here. Now, there has been some talk, it is unclear to the government whether there has been a consultation here of the motion for a preliminary injunction and the trial on the merits.

THE COURT: It certainly should have been made clear the other day. I have so ordered it.

MR. GWATHMEY: In the event that this is a trial on the merits if that is what your statement means —

THE COURT: It is a combination.

MR. GWATHMEY: The government has to request that this matter be adjourned for a short while. We want to make it very clear that we are not going to stipulate to any temporary restraining order against the operation of the statute here challenged. We also wish to point out that this statute is

significant and important to the government. The government has had one working day to prepare a brief which you directed that we prepare and to prepare evidence for presentation to you. The plaintiffs have had [72] an amount of time which we don't know. But we know that it is substantial. That circumstance to require us to go forward where the best we have been able to do is to talk to our witness in the hall and where we have not had the opportunity to get witnesses from Washington from the EDA, and where we desire the opportunity to present either by affidavit the testimony of those witnesses or in person, I think substantially prejudice our rights.

Accordingly we would request that we be allowed to take this matter up at some point in the future, but again we want to emphasize that we are in no way willing to consent to any temporary restraining order because we believe there is no basis for any such order in this case.

Thank you.

THE COURT: All right.

MR. TUMINARO: The State would want to joint [sic] in the motion. We have also submitted papers to the Court which I think sets forth the basis for our joining in the motion against the preliminary injunction. I would also point out of course that if injunctive relief is granted this may have nationwide impact and as such we have had ten cases.

We have had a temporary restraining order, we have not had an injunctive relief any where as far as I can tell. There is also that case in California. I will just [73] point it out to your Honor. I am sure your Honor is aware that the impact of any such ruling would have national effect.

THE COURT: You have a prospective injunction in the one in California?

MR. TUMINARO: With respect to certain contracts only, I think. I think the —

THE COURT: It is prospective, looking to the future.

MR. GWATHMEY: If I may address myself to that case. The facts I believe are that there was no money to be expended any further in California and that the injunction therefore had no effect on the operation of the statute in anyway. I have to make one more argument, your Honor.

THE COURT: This is a play on words. If I say you can't spend the money, that injunction certainly has some effect.

MR. GWATHMEY: The money had already been spent so that there was, there was no practical effect.

THE COURT: The Judge was not aware of the fact that all the money had been spent at that particular point. Obviously he wouldn't have written that if he thought that there had been.

MR. GWATHMEY: I have to move for a directed [74] verdict in the light of the fact that the plaintiff completed its case. In light of the government's position I strongly urge that that case can not make out a claim for a violation of the constitution or the statutes cited in the plaintiff's complaint.

THE COURT: All right.

MR. GWATHMEY: I request a ruling.

MR. BENISCH: Your Honor, I think it is absolutely essential that we all, particularly the Court bear in mind the particular relief that we are seeking here before this Court. The government has argued and the defendants have argued constantly that for the Court to grant any form of injunctive relief may have national repercussions, national impact. They hold up funding of four hundred billion dollars worth of work.

Examination of our papers makes it perfectly clear that the plaintiffs are not seeking to stop one job or one piece of Act-funded work. What we are seeking from the Court is relief from the implementation of the ten percent set aside provisions of the statute. We want the work if possible to go forward, we don't want to, if you will, throw a monkey wrench into the employment that will be generated by these jobs. We are simply asking-that until a full determination on the merits can be had, that the [75] status quo as it existed prior to the passage of this statute, that is free enterprise, be maintained. We are not seeking to tie up work. The other case and every case with the exception of the Pittsburgh case, and the California case, of course, but the other cases which are appended to the government's papers here, all of those cases Wyoming, Florida, New Orleans, the Court clearly decided and refused to grant the injunction on a balancing of the equities because the plaintiffs in those actions had sought to stop the letting of the work. We are not seeking that here.

The Court's decisions are clear that on a balance of the equities the Court said that we are not going to, and as in the California case, we are not going to hold up "x" number of man-years or person-years of work because we have a ten percent set aside here. But it is implicit, it is explicit in the California decision and implicit in the other decisions that the Court clearly

felt that there was some merit to the challenge of the constitutionality; but on the balance of the equities they were not going to hold up the letting of the work.

I submit for the Court to grant the relief that the plaintiffs are requesting here is not going to hold up the work. We are asking the Court to say to the State and [76] the City, go ahead and let your jobs but you can not refuse to grant and award contract [sic] based on this failure.

We are asking the Court to say to the government, you will not withhold funding of those grants. The grants have been made. The moneys will be drawn down as the projects progress. We are saying to the Court, to direct to the government, do not withhold the funding of these contracts while these contractors work and the projects are being built.

The relief we are seeking is I think significantly different from the relief that was sought in the other cases throughout the country. And I think that the way the relief is styled — it is both practical and reasonable on the balancing of the equities because I think it was manifested clear today that the two witnesses put on without question indicated that there were suppliers, or there were subcontractors who they would normally use who they can not use, to the extent of that set aside, those non-minorities, many of whom are as well disadvantaged.

In fact I believe there were a few in Chapter 11, the non-minorities. They are being denied the work as a result of this unconstitutional portion of the statute. So, we say to the Court that this case lends itself to the relief which the plaintiffs have requested here, and I just simply [77] ask the Court not to be misled by the government's brief, which in deed attempts to equate the relief requested here with holding up all the work across the country.

THE COURT: All right.

MR. GWATHMEY: In answer to that, your Honor —

THE COURT: Let's get the witness on the stand. I will reserve with respect to that.

MR. HARTMAN: Your Honor, my name is Gerald Hartman, from the Justice Department in Washington. I tried four of these other cases and I think there has been a misrepresentation here. I don't think intentionally of course, but I would like to state for the record and have it reflected correctly what occurred in the other litigations. As far as the question —

THE COURT: It is not the best evidence. If you want to testify, fine, but why don't you give us a memorandum and tell us what the cases are. I will read the decision and find out.

MR. HARTMAN: The Court speaks for themselves on the decisions. They reflect that the relief sought was beyond just stopping the provision.

THE COURT: Fine.

MR. GILBERT: Your Honor, I would like to state that the Health and Hospital Corporation has been served. They have asked us to appear for them. I want the record [78] to note that. I also join in the motions made for dismissal and on behalf of my client to add an additional ground, and that is on the basis of the holding of the City of Kenosha against Bruno, 412, U.S. 507, which held there is no jurisdiction because the individual governmental representatives are not named.

THE COURT: All right.

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JAMES F MCNAMARA, called as a witness by the Government, being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MS. DALEY:

Q. What is your present position, sir? A. I am an Assistant Commissioner for the New York State Division of Human Rights.

Q. How long have you held that position? A. Since March of this year.

Q. What are your duties and responsibilities briefly as Assistant Commissioner? A. My primary responsibilities are to develop State programs in the area of contract compliance, and minority utilization on State work.

Q. Prior to being Assistant Commissioner, what position did you hold? [79] A. I am on leave of absence from the City of New York where I served as director of contract compliance from October 1973 until March of this year.

Q. Would you tell us please what were you [sic] duties and responsibilities as the director of contract and compliance with the City of New York? A. They were two responsibilities. The main impact of the [sic] was to encourage the employment and the training of minority group workers and related to that also to encourage the utilization wherever possible of minority contractors on City work.

Q. Prior to being the director of contract compliance by whom are you employed? A. I was employed by the City as

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director of building trades training programs from sometime in 1970 until I became director of contract compliance in 1973.

Q. What were your duties and responsibilities there? A. To establish training programs to bring more minorities into the mainstream of contruction [sic].

Q. In connection with this course of employment which you have had since approximately 1972 to the present did you have occasion to familiarize yourself with minority participation in the contruction [sic] industry? A. Yes. Probably more accurately lack of participation [80] of minority contruction [sic] companies in the industry.

Q. Would you tell the Court please what conditions you observed with respect to minority participation over the past five years? A. Essentially —

MR. BENISCH: Objection to the testimony. This is irrelevant to the question at hand as to minority participation. Also, the witness has yet to be qualified as an expert as to MBE participation. I think in the first instance it is irrelevant to the issues before the Court.

THE COURT: I would say this: Having some familiarity with the question of minority employment in the contruction [sic] industry, and consequently my familiarity with Mr. Tuminaro, I feel that this subject matter is very closely related to the problem that the government or the Congress of the United States tried to solve in part by the ten percent provision. To that extent I find it to be relevant.

MR. BENISCH; Your Honor may I request the Court to limit the testimony then to whatever utilization or

underutilization of minority business enterprises Mr. McNamara is familiar with and not necessarily to employees and affirmative action. That is unions hiring people as opposed to entrepreneurial endeavors.

THE COURT: As I understand his position, his job then [81] and now to some extent is to see that employers comply with the affirmative action programs of the State and City and those involve the employment of varying percentates [sic] of the minorities.

MR. BENISCH: Workers. This, we are presenting here, is employment of business enterprises, MBEs, fifty percent of the stock of which are owned by businessmen, black or minority businessmen.

THE COURT: I understand.

MR. BENISCH: Who also must comply with the affirmative action requirements?

THE COURT: I understand that. But like Mr. DiMenna, it may be that some of the black businessmen started out as apprentice carpenters and it may be that they never had a chance to start out as apprentice carpenters. I think it is relevant. I will let him testify.

Q. Mr. McNamara, I believe the question to you was would you describe to the Court please the conditions that you have observed in the contruction [sic] industry over the past five years, with respect to minority participation therein? A. To focus on the problems of minority contractors, their problems have been manifold. It is sort of a cycle. In order for them to step forward with the series of meetings, [82] meeting the series of requirements involving bid bonds, performance bonds, insurance and so forth.

Very often although they may have the capacity to perform certain work, they are unable to overcome all of these hurdles. It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if they don't have an established track record. They can not establish a track record if they don't get a chance to perform. So that type of programs that I have observed and been involved with particularly with the City, have largely been ineffectual. We have required that prospective general contractors refer to a list of minority contractors that our office maintained. We have asked that they make attempts to solicit them and involve them but as a matter of the fact the net results have been extremely low.

It is extraordinarily difficult to monitor that type of operation when it is a voluntary effort that doesn't lend itself to much policing or monitoring.

Q. You told us about some problems of bonding. Can you tell us about specifically about any other problems that MBE or minority owned contruction [sic] firms encounter that you have observed? A. This again I might say gets into the area of workers and minority workers. I would estimate that about two-thirds [83] of the minority firms on our listings were non-union. They operated on the fringes of the industry. We would hear of occasions when some of the minority firms could be engaged in negotiations with the union contractor but they were unable to conclude these negotiations for subcontracts because the minority contractors work force was not in the union. They were largely minority workers and in some cases the union wasn't, simply wasn't willing to accept them into membership. This added to the problems of the minority contractors in getting a fair share of the work.

Q. Can you think or are you aware of any other problems that minority contractors have encountered? A. Well again it

is not being part of the system. They are not plugged in on the information. They may not be able to get advanced drawings or may not be able to get access to take off of jobs, the preliminary plans and budget estimates.

By not having the organizations who provide that service, by not having access to this information they are further frozen out.

Q. Does New York State have any programs which are analyqous [sic] to the Public Works Employment Act under consideration here? A. Yes. The New York Legislature passed a bill about [84] a year or so ago, establishing a set aside program for minority contractors and small business. It had to do primarily with the New York State Dormitory Authority.

Q. Could you tell us please what has been the State's experience in implementing that program? A. I am sorry to say that program remains largely on the shelf because of the funding difficulties in marketing bonds. Although the law is passed, I can not tell you that it has been implemented to any serious degree because of the financial crisis.

Q. What effects if any have you observed concerning the impact of the Public Works Employment Act on minority participation in the contruction [sic] industry? A. Well, for example just from meeting yesterday with some of the State agencies involved in the program, they described it to me as the first really successful route in assuring that there will be a portion of the work going to minority contractors.

MR. BENISCH: Objection as hearsay, your Honor.

THE COURT: I will permit it.

A. According to the reports that have reached me, it also has the impact of improving the employment picture for workers. In other words, black workers, minority workers as a general rule are suffering an unemployment [85] rate of about twice the white population. When you are dealing with the program to give work to minority contractors you are almost automatically helping to attack the problem of unemployment among black and Puerto Rican workers as well.

MR. [sic] DALEY: Nothing further.

CROSS-EXAMINATION

BY MR. BENISCH:

Q. Mr. McNamara, how much experience have you had with the jobs funded under the Public Works Employment Act? What has your experience been? A. My experience is not in the awarding of them, working in the line agencies, but rather from acting as a liason [sic] and talking to some of the agencies involved.

Q. Am I correct in assuming that the primary purpose of your office is equal employment opportunity for minority persons in the labor force, these are the unions in particular, contractors? Is that correct? A. That is our primary purpose. But we have a secondary purpose of looking into discriminatory practices effecting small entrepreneurs.

Q. I take it you are testimony [sic] that you have not discovered or ascertained there to be any concerted effort on the part of the business community in this area not to [86] do business with MBEs, is that correct, sir, to your knowledge has

there been such a movement afoot? A. Only general knowledge of all the litigation going on across the breadth of the country.

Q. I am asking in this local area, are you aware, sir, of any movement afoot in the contruction [sic] industry where contractors large or small have concertedly refused to do business with MBEs, because they are minorities, do you know that for a fact? A. I am aware of Herrick Electronics suing the City of New York being unwilling to sub out his work.

Q. I am asking you whether you know of any instance where a contractor has refused to do business with an MBE?

MR. TUMINARO: You said concerted. That wasn't the question.

THE COURT: Yes.

Q. Do you know of any concerted movement in the City of New York by the contractors, non-minority contractors who refused to do business with minority contractors, are you aware of that? A. Only aware of it as a result of their asserted efforts to come into court to throw the program out.

Q. Whose concerted efforts? [87] A. Contractors Associations.

Q. This action right here? A. Specifically the action we are in court today on?

Q. You don't take this to mean that this is an effort by the construction industry to refuse to do business with minority enterprises, do you sir? The fact that the industry has brought this action? A. That certainly is a large consequence and a net effect of it, yes.

Q. The institution of this action indicates to you a concerted effort by the non-minority contractors to freeze out the MBEs, is that what you are saying? A. It has that effect, yes.

Q. Are you aware of how many members of the associations here qualify as MBEs? A. No, I don't.

Q. Are you aware of the fact that there are members of the plaintiff associations who quality as MBE? A. I am sure in every large association of employers there are one or two minority contractors who by virtue of that affiliation can be paraded out as supporting this action.

Q. I see.

Now sir, am I correct that there exists in the area of minority business enterprise, assistance shall we say, a [88] program by the Small Business Administration of the Federal Government to provide funding for minority business enterprises with respect to obtaining bid bonds and other working capital loans; are you aware of that?

MR. [sic] DALEY: Objection, your Honor. I believe this exceeds the the [sic] scope of direct examination.

MR. BENISCH: I think Mr. McNamara testified about cash flow and bonding problems.

THE COURT: Overruled.

Q. The question Mr. McNamara, and I will withdraw it, and repeat it. Are you aware of a program in the Small Business Administration of the U.S. which provides for preferred treatment to minority business enterprises in obtaining funding

or loans be it through the SBA or their banks to put finance bid bonds construction performance and payment bonds and working capital? A. Yes. I am aware that there is an SBA program but I hesitate to say that it is on going now. I understand a lot of the funds have frozen. I understand a lot of the program is undergoing reorganization and certainly from conversations I have had with some people who have solicited loans I do not get the impression that the program has produced any significant impact on contruction [sic] contractors.

Q. Are you giving us the benefit of your impression, [89] Mr. McNamara? A. My impressions, reports, conversations, meetings, etc.

Q. What did the provisions of the SBA, NBE preferences provide, if you know?

MR. [sic] DALEY: Objection, unless he can show that the witness is qualified as an attorney to answer that question.

Q. You testified that all of New York State — you testified as to what —

THE COURT: He hasn't testified as to the law. He hasn't testified as to the provisions of it. He has testified that the law was passed.

MR. BENISCH: I will withdraw the question.

THE COURT: The Court takes judicial notice of the fact that there is an SBA Act and that there is a preference provision which was subsequently enacted.

Q. All right, Mr. McNamara, with repsect [sic] to the inability of the MBEs in this area to obtain bidding documents

or contract documents, am I correct, sir, that this is a function of the letting agencies charging money to take out bid documents and the MBEs, either for one reason or another do not elect to pay the moneys to take down the bid documents to look at the work, is that correct? A. In part it is. But there are also other services, [90] reporting services that provide this kind of thing that they simply don't have the funds to subscribe to?

Q. Are they not City agencies that make a special point of advising MBE contractor groups or MBEs individually of City work that is to be let in this area? A. There are City agencies and I might add some state agencies that do have some fairly decent track records in making that effort. But they are very spotty —

MR. [sic] DALEY: Objection. He didn't let the witness finish.

A. There are some honorable exceptions to that but it is not an on-going practice in every one of the myriad State and City agencies to do that, unfortunately.

Q. But as I understand it Mr. McNamara that the City and State Agencies have to a large extent gone to and made efforts to help minority business enterprises in this area and bring them into the mainstream of the construction work here in this City, isn't that so? A. Not in any substantial or successful way.

Q. All right. This then I take it is the fault of the City agencies and the State agencies, isn't it?

MR. TUMINARO: Objection.

THE COURT: The objection is sustained.

Q. When you refer to minority businesses, which you have [91] observed over the years in your tenure as a State and City employee, what kind of business are you referring to, what are they? A. Most of my contact has been more in the construction area, construction contractors and suppliers.

Q. What do you, when you talk, when you mention the term minority businesses, what is you [sic] definition of the term as you use it, who is a minority business? A. We use the standard federal nomenclature, a firm where the majority of the company is owned by principals who are members of minority groups.

Q. I see.

In other words, the ownership is controlled by minority groups. A. Fifty percent or more minority controlled, blacks, Spanish surnames, orientals.

MR. BENISCH: I have nothing further, your Honor.

MR. [sic] DALEY: No further questions, your Honor.

THE COURT: You are excused.

(Witness excused)

MR. GWATHMEY: Your Honor, we handed you yesterday a set of exhibits or addendums to our memorandum of law which were numbered one through eleven. I have Exhibits 12 through 15 now which constitute some of the documentary [92] evidence that I referred to earlier. I would like to hand them up to you, your Honor.

In addition a number of these exhibits are reports of governmental agencies. We would like to have them introduced into the record as evidence. I think we can facilitate it by simply going through an [sic] noting the numbers of the ones that we wish to have introduced and asking Mr. Benisch whether he will stipulate to that admissibility.

THE COURT: All right. What I would suggest we do, is we take a five minute recess and you and Mr. Benisch can go over it right here. When you are ready I will come out and we can enter them.

MR. BENISCH: Your Honor, as I said to the Court, I will hand something up which I think will be helpful and not be a burden on the Court. There has been a recent decision in the Fifth Circuit Court of Appeals in Weber against Kaiser Alluminum, [sic] the Fifth Circuit, dated November 17, 1977, which I became aware of subsequent to the preparation of plaintiff's brief. I would like to hand that up for the Court as an aid to the Court.

THE COURT: All right.

MR. BENISCH: It is too new to be cited.

THE COURT: Give them a copy.

We'll take a short recess.

(Recess)

[93] MR. GWATHMEY: Your Honor, Mr. Benisch has stipulated the admissibility of Exhibit 2, 11 and 12 to our memorandum of law. He has taken exception to our proposed offer of first Exhibit 1. The document captioned Minorities and

Women as Government Contractors, a report of the U.S. Commission of Civil Rights, dated May 17th, 1975. I would like to have marked for identification, please. I offer it in evidence also.

(Defendant's Exhibit 1 marked for evidence.)

MR. BENISCH: Your Honor, shall I address myself to my objections to this?

THE COURT: Why don't we do it this way. Why don't we know if you are objecting to all of them and then let's get on with all of them. If these are reports of governmental commissions, I am going to receive them. I think that I am permitted to do that under the rules of evidence in the Federal Court.

MR. GWATHMEY: We are additionally offering Exhibits 13, 14 and 15 to our memorandum of law, 13 being Minority Business Opportunities Committee Handbook, U.S. Department of Commerce, Office of Minority Business Enterprise. Mr. Benisch has pointed out that — I take it back.

THE COURT: All right.

MR. GWATHMEY: I offer it as Defendant's Exhibit 2.[94] I offer as Defendant's Exhibit 3 the report of the Controller General of the U.S., a document entitled Department of Defense Program to help minority run businesses get sub-contracts not working well. I note that this document is an excerpt beginning on page 19 of the publication, and although I am sure this is available to Mr. Benisch upon his application, we will undertake to submit to the Court and to him a full copy of the document if that will alleviate part of his objections to it.

THE COURT: I would submit a full copy to him.

MR. GWATHMEY: We will do that. We will later exchange it for the full copy.

THE COURT: Yes.

(Defendant's Exhibit 2 and 3 for identification.)

MR. GWATHMEY: I offer a document captioned Summary of Activities of the Committee on Small Businesses, House of Representatives, 94th Congress, November, 1976. This is also a report. Subject to the same limitation I stated with respect to the last document I will submit the full report if that is deemed necessary. However, this is a report of Congress.

(Defendant's Exhibit 4 marked for identification.)

THE COURT: Mr. Benisch, do you have any reason to doubt the authenticity of these reports?

[95] MR. BENISCH: Your Honor, with respect to Exhibits — I have only here the number 14 annexed to the brief, I am getting only a protion [sic] whereas the table of contents indicates that it goes from page 1 through 28 plus. I only get from page 19 to 20. I simply said that it is a partial offer.

THE COURT: What I would suggest is if you have similar objections with respect to any of these documents, that you be furnished with a full copy of the document, and by Monday. And if you then have the objections to the authenticity, or if you wish to submit to the Court such other portions that you would be authorized to do it, because I would accept it if you will, for instance, it is a handbook issued by Commerce or something like

that — I will take whatever you send to me as being the part that you think is important as far as your case is concerned.

MR. BENISCH: Yes. With respect to Exhibit No. 1 for identification, which is the Exhibit 1 of the brief, Minorities and Women as Government Contractors, I believe under the Federal Rules of Evidence the material is objectionable, that is a government publication if the sources of the other information or the circumstances of it indicate a lack of trustworthiness. I am quoting from the Federal Rules of Evidence.

[96] THE COURT: What indicates a lack of —

MR. BENISCH: The Exhibit itself in referring the Court to Page 111 of that Exhibit, states that — again your Honor, if I call the Court's attention to it — Exhibit 1 for identification consists of a 97 page document. The full document consists of a 189 pages.

THE COURT: Do you have the full document?

MR. BENISCH: Yes. Referring to the full document, pages 11, pages 111, if you please, the following language under paragraph 1 states as follows: Federal Government procedures for collecting and distributing data on minority firms and for determig [sic] their share of government contracts are inadequate and inconsistent.

Furthermore, referring over to page 78 of the offer, to the following language at the first to last paragraph on that page, I quote availability of data, nine of the ten federal agencies surveyed by the Commission reported that they had not established systems to collect relevant and reliable information on minority subcontracting. And then there is a footnote.

I am contending to this Court that the offer by its own language is suspect of trustworthiness and is nothing more than the best job that could be done under the circumstances, albeit the information was lacking and inadequate.

[97] THE COURT: That goes to the weight and that is all. I will receive it.

MR. BENISCH: All right.

THE COURT: Is [sic] there is anything else that you want to read into the record with respect to the full report other than the item that you did read?

MR. BENISCH: Between 97 and 183? Could we have the same stipulation from the government as we did with others, and that is they will offer the full document as the exhibit rather than just a partial offer?

THE COURT: All right.

MR. BENISCH: Thank you.

THE COURT: What else do we have? You are offering all the others there are as well, is that it?

MR. GWATHMEY: I am offering the ones which I stated before, to wit, 2, 11 and 12, to which plaintiffs had no objection.

THE COURT: Those are all received. Any document that is not complete we will get the complete document.

MR. GWATHMEY: Your Honor, I would like to make one more procedural change here. The brief which we submitted

to you earlier today had a mixup in the order of the pages. I would like to give this one to you for the other one.

THE COURT: I don't know if I have the other one. [98] He has it.

We believe in splitting the burdens. I carry some and my clerk carries some.

MR. GWATHMEY: I would renew our motion for a directed motion at this time.

THE COURT: That would be reserved. All motions are reserved at this point. I will consider this matter fully submitted as of five o'clock on Monday.

MR. BENISCH: May the plaintiffs have until that period to respond to the State, to the defendant's brief?

THE COURT: That is what I mean. Anything that you wanted to submit, five o'clock Monday is the deadline.

MR. BENISCH: Will the Court entertain plaintiff's application for the temporary restraining order with respect to the contracts being let on Monday that were testified about today?

THE COURT: No.

MR. GWATHMEY: May we make an application for Wednesday?

THE COURT: No.

MR. GWATHMEY: To submit a post hearing memorandum?

THE COURT: No. Monday is a sufficent period of time.

MR. GWATHMEY: Thank you, your Honor.

[99] THE COURT: Good afternoon.

MR. GWATHMEY: Thank you, your Honor.

(Time noted: 5:30 p.m.)

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Name	Direct	Cross	Redirect	Recross
Nicholas DiMenna	9	24	39	
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PLAINTIFFS' EXHIBIT 1 — EDA MINORITY BUSINESS ENTERPRISE (MBE) TECHNICAL BULLETIN DATED OCTOBER 11, 1977

EDA Minority Business Enterprise (MBE)
Technical Bulletin
(Additional Assistance and Information Available
To Grantees and Their Contractors
In Meeting The 10% MBE Requirement)
October 11, 1977

I. Introduction

II. Grantee Project Management

1. Definition of Minority Group Member

2. Single Prime Contract Project

3. Multiple Contract Projects

4. The 40% Completion Report

5. Determination of Bona Fide Minority Business Enterprise

III. Waivers

1. Waiver Requests

2. Waiver Criteria

3. Unsatisfactory Results From Competitive Bidding

4. Excessive Price of Responsive Bidders

Plaintiffs' Exhibit 1

IV. Other Problems

1. Federal Bonding Requirements

2. Delayed Payment To MBE Subcontractors

3. State Statutes As Impediments to MBE Participation

V. Technical Assistance

1. Small Business Administration (SBA)

2. OMBE/SBA Full Service Cities

3. EDA Funded Technical Assistance

4. F.W. Dodge Construction Reports

VI. Complaint Procedures

Plaintiffs' Exhibit 1

I. Introduction

As the Guidelines for Round II of the LPW Program state, EDA "ascribes a high priority to the development and support of minority business enterprises and will enforce the 10% MBE participation requirement strictly." The purpose of this bulletin is to set forth further guidelines which are to be considered in resolving problems which may arise in implementation of the MBE program. This bulletin should be used as a supplement to the Guidelines for 10% Minority Participation in LPW Grants which have already been provided.

II. Grantee Project Management

1. Definition of Minority Group Member

13 CFR 317.2 defines a minority group member as "a citizen of the United States who is Negro, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut." Further definition of these minority groups is required to clarify the many ambiguities associated with their use. Therefore, these terms shall be interpreted by EDA in the following manner:

a) Negro — An individual of the black race of African origin.
b) Spanish-speaking — An individual of a Spanish-speaking culture and origin or parentage.
c) Oriental — An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.
d) Indian — An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a

suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)
e) Eskimo — An individual having origins in any of the original peoples of Alaska.
f) Aleut — An individual having origins in any of the original peoples of the Aleutian Islands.

2. Single Prime Contract Project

When most or all of the grant funds are to be expended through one prime construction contract, the grantee will have to rely on that contract to generate the required expenditures for MBEs. The grantee should require all bidders for the prime contract to provide for expenditures of at least 10% of the grant funds for MBEs. A requirement for expenditure of 10% of contract funds would not suffice because the successful bidder might well bid less than the full grant amount. In order to avoid confusion, that amount of MBE participation should be expressed in absolute dollar terms rather than as a percentage. Thus, if the grant is for $1 million, the invitation for bids should require spending at least $100,000 for MBEs so that the grantee will be sure of fulfilling its 10% MBE requirement regardless of the exact amount of the successful low bid.

3. Multiple Contract Projects

As stated in the guidelines, the grantee has the responsibility for planning how the 10% MBE requirement will be met when a project is to be implemented through a number of contracts. The grantee may enter into direct contracts with MBEs involving at least 10% of the grant. Otherwise, invitations for bids for those contracts which will involve subcontracts or purchase of significant supplies must include a requirement of sufficient MBE participation so that 10% of the grant funds will be spent

for MBEs. Grantees should not put off fulfillment of their 10% MBE obligation until contracts to be made late in project implementation, unless they are sure that sufficient MBE participation will occur under those later contracts.

If a grantee's initial report on Form 530 Part A does not reflect MBE participation in at least 10% of the funds to be spent under contracts already executed, EDA will ordinarily not delay issuance of the first letter of credit but will insist that the grantee demonstrate how it will expend sufficient funds in future contracts to fulfill its requirements.

4. 40% Completion Report

If a grantee's report on Form 530 Part A at 40% completion does not reflect 10% MBE expenditures through executed contracts then in force, the grantee must demonstrate how it will meet its 10% MBE obligation before EDA will issue the second letter of credit. That demonstration must ordinarily include the names of the proposed MBEs, a description of the work each will perform, and estimates of the amount of funds to be spent on each proposed contract and of the date on which each contract will be signed. If such information is not available, the grantee will have the burden of producing other information to demonstrate that it will comply with the 10% MBE requirement or that a waiver should be issued.

5. Determination of Bona Fide Minority Business Enterprise

For purposes of the LPW program, an MBE is a business at least 50% owned by minority group members or other MBEs (or, in the case of a publicly owned business, at least 51%). For example, enterprises A and B form joint venture J.V., in which they participate equally. Enterprise A is wholly owned by

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minority group members, and enterprise B by non-minority group members. Enterprise A qualifies as an MBE, and since A owns 50% of J.V., the joint venture also qualifies as an MBE.

An MBE is bona fide if the minority group ownership interests are real and continuing and not created solely to meet the 10% MBE requirement. In addition, to fulfill the purpose of the 10% requirement the MBE must itself perform significant work or services or provide supplies under the contract and not act as a mere conduit. In short, the contractual relationship must also be bona fide.

EDA will generally rely upon the statements contained in form ED 530, Parts A and B, to determine whether an enterprise is an MBE and the dollar amount of its contract. However, EDA may require further information in the following circumstances:

a) The enterprise does not appear on the list of MBEs maintained by EDA at its Regional Offices.

b) Receipt of a complaint that the MBE or the contract is not bona fide. [See Section VI regarding complaints]

c) The enterprise is not wholly owned by minority group members, particularly where the minority ownership is of recent origin as in a joint venture.

The question may arise whether an MBE is bona fide. In such a case, EDA will seek to determine whether the minority group owners or stockholders possess control over management, interest in capital, and interest in earnings commensurate with the claimed minority ownership.

Although an enterprise may qualify as an MBE, in order for the gross amount of a contract for the purchases of services or materials from an MBE to count toward the 10% requirement, the MBE must be significantly and substantially involved in

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providing the services or materials. It is the intent of EDA to allow credit for utilization of MBEs only for those contracts in which involvement constitutes a basis for strengthening the long-term and continuing participation of the MBE in the construction and related industries. On contruction contracts or subcontracts an MBE must be significantly involved in the actual performance of the contract responsibilities and work or in effectively meeting the liabilities of the contract obligation. Similarly, for the gross amount of contracts for the supply of materials and supplies to count against the 10% requirement, the MBE must be significally and substantially involved in the production of such materials and supplies or be so involved in effectively meeting the liabilities of the contract. Where an MBE acts merely as an agent or a relatively passive conduit in connection with the provision of services or materials, only the commission or fee earned by the MBE may be counted toward the 10% requirement. Even this commission or fee will not be counted if the MBE performs no substantive services and is a totally passive conduit. In determining whether the involvement of an MBE is significant and substantial, EDA will consider the following:

a) Industry practice.

b) Amount of control and risk retained by the MBE.

c) Whether the MBE or some other party is looked to for performance.

d) The amount of work subcontracted out by the MBE. If the subcontract or subcontracts total more than 90% of the contract entered by the MBE, the contract will not be credited towards the 10% MBE requirement.

e) Any other relevant factors.

The following examples illustrate the above principle:

a) A prime contractor enters into a contract with an MBE for electrical work. The subcontract price is $50,000. The MBE

has previously agreed to enter into a second contract with an electrical contractor which is not an MBE. The second contract is for $49,000 and assigns all responsibility for performance under the first contract to the electrical contractor. Since the MBE will itself provide no performance and the subcontract exceeds 90% of the contract, none of the $50,000 contract contributes towards the 10% requirement.

b) A manufacturer of construction materials enters into a contract with a prime contractor for delivery of materials. The contract notes that an MBE, which is an entity separate from the manufacturer, shall be the distributor. However, delivery shall be direct from the manufacturer to the prime contractor, the risk for defective products or late delivery is on the manufacturer, and payment by the prime contractor will be to the manufacturer. The distributor has some minor responsibilities based upon a separate agreement with the manufacturer, and will receive 4% of the contract price as its fee. Only the agreement between the manufacturer and the distributor is a contract with an MBE. Hence, only the minority distributor's fee of 4% of the total contract price contributes towards meeting the 10% requirement.

c) An MBE is awarded the prime contract by a grantee. Consistent with industry practice in the area, the MBE enters into subcontracts totalling 50% of the prime contract. The MBE has obtained a performance bond for the entire project, retains general control over the project site, provides coordination and supervision of the subcontractors, and is looked to by the grantee for performance on the entire prime contract. The entire prime contract contributes towards the 10% requirement.

III. Waivers

1. Waiver requests

Complete or partial waiver of the 10% MBE requirement may be requested only by the grantee. Waiver requests must be made in

writing to the Regional Office. They should contain the following information:

a) Name of the grantee.

b) Project number.

c) The specific request, i.e., for a complete waiver or a partial waiver down to a specific percentage of the grant.

d) Efforts taken to locate MBEs, including descriptions of contracts with the Office of Minority Business Enterprise, the Small Business Administration, and other referral agencies.

e) A list of each MBE contacted and the reason each was not used.

f) Assistance offered by the grantee and/or prime contractor to MBE's, such as bonding, meeting union requirements, and obtaining working capital.

g) Any additional information that the grantee believes is relevant.

2. Waiver Criteria

The waiver request will be evaluated according to the following criteria:

a) Efforts to Utilize MBEs — The most important criteria Specialists will use in evaluating waiver requests are the efforts taken by the grantee and potential contractors to locate qualified, bona fide and available MBEs whose market area includes the project location. The Specialists will confirm that information contained in the waiver request and seek additional information when necessary.

b) The Number of Available MBEs whose Market Area Includes the Project Location — To determine if MBEs are available EDA's Civil Rights Specialists will use:

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i) Lists of MBEs that they have developed.

i) When appropriate, Specialists will review project applications to find out where the project will be advertised and what specific services and supplies are required.

iii) When a project is located near the boundary of two Federal regional jurisdictions, the Specialist may contact the appropriate EDA, OMBE or SBA office responsible for the second jurisdiction for additional assistance. Specialists will also advise grantees and their prime contractors to contact additional offices when appropriate.

c) The Size of the Minority Population — This factor is of limited significance by itself and will be used in conjunction with other criteria.

d) Additional Criteria

i) It may happen that promised MBE participation does not occur because an MBE drops out or the contract with the MBE is terminated due to failure to perform. In such situations the following additional criteria will be utilized in considering a waiver request:

A) The reasons the MBE could not perform.
B) Assistance provided by the grantee and/or prime contractor to the MBE, such as bonding, meeting union requirements, and obtaining working capital.
C) Efforts taken to obtain a substitute MBE.

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ii) In a case where an enterprise previously considered to be an MBE is found not to be bona fide (see section II (6)), the Specialists will consider the following additional criteria in evaluating a waiver request:

A) Whether the grantee and/or prime contractor were reasonable in believing the enterprise was an MBE.
B) Efforts taken to obtain a substitute MBE.

The Specialist will inform the grantee by telephone, usually within 2 days, whether or not the waiver has been granted. A confirming letter will follow. A denial of a waiver request will not prejudice a grantee if it later again requests a waiver.

3. Unsatisfactory Results From Competitive Bidding.

There may be occasions when competitive bidding procedures give results which are unsatisfactory to a grantee, and the grantee believes the problem is the 10% MBE requirement. A grantee who has solicited bids may find, for example, that:

a) No bids are submitted; or
b) Bids are submitted but they provide a level of MBE utilization of less than 10% of the grant.

The following questions and answers explain how such situations should be handled.

Question: What should the grantee do if it has already solicited bids for a contract, and none of the bidders promise sufficient utilization of MBE's to meet the 10% requirement, for example, where the otherwise responsive bidders promise to use only 7%, 6%, and 5% respectively.

Answer: Such bids are non responsive and therefore the grantee may negotiate for a contract if there is no legal prohibition to do so within the grantee's state or the grantee may elect to readvertise the invitation for bids. However, if the readvertisement would require EDA to extend the 90 day start of construction date and negotiation is possible under local law, and can be completed within the 90 day limit, the grantee must negotiate, unless EDA waives the 90 day requirement.

Whether the project is readvertised or negotiated, to be responsive a bidder or offeror must assure minority utilization at least equal to the highest figure received in response to the first advertised bidding request, in this example 7%. However, a waiver of the remaining 3% must first be granted by the EDA Regional Office. The partial waiver will normally be granted in such a case, provided that the Regional Office is reasonably satisfied that the non responsive bidding did not result from the failure of the grantee and the bidders to seek out MBE's or from collusion.

When negotiation is used, the following standards must be met (except for those that are prohibited by law in the grantee's state): (1) each responsible bidder must be notified of the intent to negotiate; (2) each such bidder must be given a reasonable opportunity to submit an offer or resubmit its original bid as its offer; (3) the grantee must advertise the intent to negotiate in a manner similar to that used for the invitation for bids and must accept offers from parties that have not previously submitted a bid; (4) the negotiated price must be the lowest price offered by any responsible offeror which assures minority utilization at least equal to the highest figure received in the response to the first advertised bidding request; (5) a record of oral negotiations must be made and retained for 3 years after the award of a contract; (6) offerors may amend their proposals during the course of negotiations; (7) negotiations must be conducted with all offerors within a competitive range; (8) a common cut-off

date must be announced to all offerors, at which time no further negotiations may be had and the "best and final" offer is to be in hand; (9) the contracting officer may not transmit information contained in any proposal by an offeror that may afford a potential advantage to any other offeror; and (10) auction techniques may not be utilized.

* * *

Question: What if no bids at all are received after advertising?

Answer: This situation is similar to the preceding case in which no responsive bids were received. The contract should be readvertised or negotiated under the conditions described in the previous question, with changes made to make the contract more attractive. However, a no bid situation is not a case where a waiver of the 10% MBE requirement is easily justified. There may be other reasons besides the 10% MBE requirement that could cause a no-response situation.

Since a no-response situation should be a very rare occurrence, the Regional Offices will give such cases individual treatment. It will be important to determine the cause of the lack of response. One way this will be done is by asking the grantee for the names of the contractors who considered submitting bids. A grantee will usually keep a list of those contractors who have picked up its bidding plans. Before a waiver of the 10% MBE requirement is considered, EDA will contact some of these contractors to verify that they made every feasible effort to fulfill the 10% MBE requirement but were unable to do so, and that such inability caused them not to bid.

* * *

Question: What if there is not enough time to readvertise and still meet the 90-day requirement?

Answer: State or local law may demand a minimum amount of time between advertisement and award of the contract. If this would mean that the 90 day requirement could not be met, the grantee should ordinarily negotiate for a contract if local law permits. If the grantee wishes to readvertise for bids, it must request a waiver of the 90 day requirement. Any waiver will be for the minimum amount of time necessary. The use of this sort of waiver should be restricted to special cases. Where a waiver, is not approved, the grantee shall negotiate for a contract as discussed in a previous question.

4. Excessive Price of Responsive Bidders

The grantee has three choices. It can contribute some of its own funds to the project, it can reduce the scope of the project and readvertise, or it may be able to negotiate the contract. The last possibility would require a waiver of competitive bidding requirements from the Regional Office. This will not be granted unless there is a finding that the low bid price is unreasonably high, as discussed in the next question and answer. After the waiver is granted, the following requirements must still be met:

a) Notification of an intention to negotiate and reasonable opportunity to negotiate must be offered to each responsible bidder who submitted a bid.

b) The negotiated price must be the lowest negotiated price offered by any responsible bidder and must not exceed the low bid price that resulted from advertising.

c) 10% MBE utilization must be promised. There can be no waiver of this requirement, unless the circumstances are like those discussed in the following question and answer.

* * *

Question: Should a request for waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?

Answer: It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored, the following determinations will be made:

a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographical location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects the MBE's costs of doing business or results from discrimination.

b) The contractor has contacted other MBEs and has no meaningful choice but to accept an unreasonably high price.

* * *

Question: What about the situation when there are bids which are responsive and therefore promise to meet the 10% requirement but they are above the project budget, and there is a bid below the project budget which requests a waiver of the 10% requirement?

Answer: A waiver of the 10% requirement cannot be granted to the bidder who bid below the project budget; only responsive bids can be awarded a contract. The grantee still has only three

choices. It can contribute some of its own funds to the project, it can reduce the scope of the project and readvertise, or it may be able to negotiate the contract.

IV. Other Problems

1. Federal Bonding Requirements

Attachment B to Office of Management and Budget Circular No. A-102 sets forth Federal bonding requirements for grant projects. If the contract under a Federal grant is for $100,000 or less, the grantee shall follow its own bonding requirements. For those contracts exceeding $100,000 for construction or facility improvement, EDA may accept the bonding requirements of the grantee, if EDA determines that the Federal Government's interests are adequately protected. If such determination has not been made, the minimum bonding requirements shall be as follows:

a) A bid guarantee from each bidder equivalent to five percent of the bid price.

b) A performance bond on the part of the contractor for 100 percent of the contract price.

c) A payment bond on the part of the contractor for 100 percent of the contract price.

d) Required bonds shall be obtained from companies holding certificates of authority as acceptable sureties.

Grantees wishing a determination that the Federal Government's interests are adequately protected by local bonding requirements, should contact their EDA Regional Office.

2. Delayed Payment to MBE Subcontractors.

Grantees and their contractors are encouraged to make every effort consistent with sound construction management to assure that minority subcontractors are paid on time. Adequate working capital is important to all subcontractors and is crucial to the success of minority subcontractors. EDA, in responding to allegations regarding slow payment, and in reviewing vouchers submitted for payment by grantees and their contractors, will seek to determine whether minority subcontractors that have performed adequately have been paid on a timely basis. The failure of an MBE to continue performance because of untimely payment will be considered by EDA in evaluating a request for a waiver of the 10% requirement.

3. State Statutes As Impediments to MBE Participation

Where the LPW grantee is a state agency or department, a county, a municipality or other governmental unit, it will probably find its contracting activities governed by state statutes.

Such statutes could, for many grantees, impede compliance with the 10 percent MBE requirement. For example, an otherwise qualified MBE subcontractor who is not licensed in the state where the project is located may not be a "responsive bidder" under state law; a multiple-prime contract law may tend to eliminate MBE participation because of fewer subcontracts; prequalification of bidders may effectively eliminate MBE access to competition; or Federal and state requirements may be incompatible with one another.

Where problems of this nature arise, the solutions may depend upon factors such as the identity of the grantee and the nature of

the project. The solutions, as do the problems, ultimately turn on state law and its interpretation. Therefore, we cannot provide definitive advice here. The questions and answers which follow will, however, suggest approaches to solving problems arising from state law. The grantee is advised to ask legal counsel for further assistance.

* * *

Question: May a grantee dispense with state competitive bidding requirements and negotiate the prime contract with one or more MBE's?

Answer: The grantee should explore whether a categorical exception to competitive bidding is available. For example, a particular public agency may be exempt from public advertising and competitive bidding under a judicial decision, or the requirement may have been held discretionary as to a particular public agency. These exceptions are typically set forth only in judicial decisions, State Attorney General's Opinions, or in a statute governing the particular public agency and not in the general public contracting or public works statutes. This discussion presupposes that the grantee has already obtained a waiver from EDA to dispense with competitive bidding pursuant to LPW Round II regulation 13 CFR 317.19(a)(1).

* * *

Question: Because state law calls for multiple prime contracts, the grantee anticipates difficulty in making up its 10 percent MBE requirement on subcontracts, should no MBE's be awarded prime contracts. What can be done?

Answer: Before drawing up specifications, check to make sure that the multiple-prime contract law applies to this grantee. In

New York State, for example, the multiple-prime law applies only to contracts on buildings. If the public works project is not construction, renovation etc. of a building, the multiple-prime contract law does not apply. Only a careful review of the statute can determine its precise scope.

* * *

Question: What can be done when the criteria for determining responsiveness to an invitation to bid are locked in by law and focus on factors like financial responsibility, bonding, and experience on the type of project under bid and do not include an MBE-participation factor?

Answer: Even where the criteria for responsiveness are contained in a statute or regulation, the provision may not apply to a particular grantee or a particular type of project, for example, where the grantee is a municipality and the criteria apply only to state contracts. Also, the criteria may be applicable only to construction projects, and the project of concern is to erect street lights, which, under state law, is considered "improvements", not "construction."

Even though the statutory criteria are applicable to a project, the statute itself or a judicial decision may make their use discretionary, not mandatory, or may permit the contracting authority to add factors tailored to the particular project. If the statute merely tells the contracting authority or a commission with oversight responsibility to promulgate responsiveness standards for each project individually, there may be sufficient latitude to incorporate the MBE-participation factor.

* * *

Question: What can be done where prospective bidders must prequalify, effectively limiting participation to contractors with

extensive experience in jobs of the kind being undertaken, and necessarily injuring the changes of MBE's of getting into the competition?

Answer: Prequalification of bidders is usually only permitted by law and not required by law. Furthermore, as with responsiveness criteria and multiple-prime contract laws, the statutory prequalification scheme may not apply to a particular grantee or a particular project. Each state statute should be reviewed to determine whether circumstances permit a grantee to dispense with prequalification and issue an open invitation to bid.

* * *

Question: What can be done when an otherwise qualified MBE has been unable to obtain the proper state license?

Answer: Expedited licensing or an easing of licensing requirements by the appropriate state authorities appear to be the most straightforward approaches, although they may not be possible. It may be important to know when the last possible time would be that a prospective awardee could be issued a license and still be eligible to receive award of the contract: when he submits his bid? when he receives award of the contract? at time of performance? when he first demands payment? The state licensing law, public contracting law, or public works law may permit some flexibility. Of course, any flexibility would need to be exercised so as not to discriminate against unlicensed non-MBE bidders.

* * *

Question: What can be done when state requirements conflict with an LPW requirement or threaten to interfere with an LPW objective?

Answer: The grantee should look for an applicable "conflicts law." Your state may have a law which resolves a conflict between Federal and state requirements in favor of the former where Federal assistance would otherwise be jeopardized. This type of provision has the effect of determining in advance which of two incompatible laws shall prevail in circumstances where compliance with both is impossible or perilous. Such provisions are to be found, if at all, in the public works, public contracting or other chapters of a state code, in an enabling act authorizing the particular or any request for Federal funding, in a state constitution, or even in a municipal charter. If all else fails, a grantee could try to find an applicable judicial decision holding that an enabling act, even without a conflicts provision, authorizes the applicant for Federal assistance to comply with the conditions attached to the Federal funding, state requirements to the contrary.

V. Technical Assistance

1. Small Business Administration (SBA)

To assist grantees in meeting the 10% requirement, EDA has funded SBA to provide surety bond guarantees, guaranteed working capital loans and marketing assistance to qualified minority firms. Following is a description of assistance available from SBA:

a) Bond Guarantees

Any contractor required to have a bid, performance, or payment bond(s) in order to obtain a contract, including but not limited to firms in construction, repair, maintenance, service, supply and janitorial work, may apply for a bond guarantee. If there are any questions as to your concern's eligibility, please contact your nearest SBA office.

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The SBA can guarantee bonds for contracts up to $1,000,000; however, there is no limit to the number of bonds that can be guaranteed for any one contractor.

In consideration of the Surety Company's paying the SBA 20 percent of the gross bond premium, SBA guarantees the Surety Company up to 90 percent of any loss sustained on contracts up to $250,000 and 80 percent guarantee for those contracts in the $250,000 — $1,000,000 range. These guarantees are subject to a $500 maximum deductible to the Surety Company regardless of the contract amount.

The contractor must make application to HIS LOCAL SURETY BOND AGENT/BROKER for a specific bond by providing various background, credit and financial information required by both the Surety Company and the SBA. In order to do so, there are certain forms which must be completed, including those of the SBA.

The agent is responsible for obtaining and submitting all of the data provided by the contractor together and at one time to the Surety Company accompanied by the contractor's fees in separate checks and the agent's check for the net premium.

The Surety Company reviews data received from the agent and decides:

i) to execute the bond without SBA's Guarantee,
ii) to execute the bond only with SBA's Guarantee, or
iii) to decline the bond even with SBA's Guarantee

However, if the Surety Company decides to execute the bond on the basis of SBA's Guarantee, it prepares appropriate forms and forwards the same with supporting data (including contractor's fees) to the appropriate SBA office, requesting SBA's Guarantee.

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SBA, upon receipt of the Surety Company's submission, applies its own underwriting criteria. If the decision is favorable, SBA completes, executes and returns the Guarantee Agreements to the Surety Company; otherwise, the SBA signifies its disapproval and returns the submission to the Surety Company, less the contractor's $10.00 application fee, which is not refundable.

The contractor must pay the SBA a fee of .2% ($2.00 per $1,000) of the contract amount. The contractor must also pay the Company a premium charge for the bond which is a maximum allowable of 1 1/2% ($15.00 per $1,000) on the first $250,000 of contract amount and 1% ($10.00 per $1,000) on the excess.

SBA District Offices serving your area will provide counseling to contractors in compiling the necessary data required by the Surety Company, in addition to certain financial, management and technical assistance either sought by the contractor or recommended by the Surety.

b) Working Capital Loans

The Small Business Administration may guarantee up to $500,000 ($100,000 under the Economic Opportunity Loan Program) or 90% of the total loan, whichever is less. The amount of the loan, which must be used for a specific contract, cannot exceed the cost of the material and labor needed to comply with terms of the contract.

The loans are available to construction contractors, manufacturers and service contractors who provide specific services under an assignable contract. They must have been in business for 12 months before making application and must be unable to obtain the required financial assistance without SBA's guaranty.

Eligible businesses may apply prior to or after a contract has been received. Detailed information on the bid or contract must be available at the time of the application.

c) Assistance in Identifying Minority Small Business Firms

Should you need assistance in locating minority firms to participate in the Local Public Works Program, the Small Business Administration has a marketing assistance, Minority Vendors Program, to identify and expand business opportunities for minority firms. The MVP can furnish the grantee or general contractor with a profile of minority business in any specific area. Should you need these services, please contact your local SBA office.

For additional information on the Local Public Works Program and SBA services mentioned above, contact the nearest SBA office, consult your local telephone directory under "U.S. Government" or refer to the list at the end of this bulletin. For questions that cannot be answered by your local SBA office, contact the following "special desks" in Washington:

Surety Bond Guarantees	— Danny Gibb (202) 653-6933
Guaranteed Loans	— Arthur Armstrong (202) 653-6574
Minority Vendors Program	— Milton Wilson, Jr. (202) 653-6794

2. OMBE/SBA Full Service Cities

In a number of cities EDA has funded SBA and OMBE to provide supplemental technical, financial and bonding assistance

to minority firms working on Local Public Works Projects. Grantees, contractors and minority firms are encouraged to contact the appropriate person to obtain assistance. A list of these cities as well as the name and phone number of the person who should be contacted is attached at the end of this bulletin.

3. EDA Funded Technical Assistance

EDA is providing additional assistance to grantees, prime contractors, and Minority Business Enterprises (MBEs) to maximize MBE participation in the Local Public Works program (LPW). EDA awarded six-month contracts on September 29, 1977, to the following organizations to supplement technical assistance provided by OMBE and SBA. A partial list of available services is indicated below. To request assistance, contact your local EDA Regional Office.

a) The National Association of Minority Contractors (NAMC) will assist MBEs in obtaining and fulfilling contracts. Its services include:

i) Assisting MBEs to qualify for and negotiate contracts with grantees and prime contractors, to formulate bids and estimates and to prepare construction schedules.
ii) Formulating joint-ventures and other multi-contractor arrangements.
iii) Assisting MBEs with purchasing, leasing, recordkeeping, reporting, resolving labor disputes, and related problems.

b) National Institute for Advanced Studies (NIAS) will assist grantees in securing qualified MBEs. Its services include:

i) Identifying and profiling qualified minority firms and assisting grantees in utilizing such identification materials.

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ii) Planning a program to correct any MBE management and financial deficiencies.

c) Urban Development and Management Corporation will assist MBEs in bonding and financing matters. Its services include:

i) Mobilizing financial resources and surety companies for cooperation and assistance with financing and bonding.
ii) Assisting MBEs in qualifying for and negotiating finances and bonding.
iii) Utilizing electronic data processing networks to assist MBEs in controlling costs, labor, cash flow, and related items.

4. F.W. Dodge Construction Reports

To further assist grantees and contractors in meeting the 10% MBE requirement, EDA is contracting with the F.W. Dodge Company to provide detailed LPW project information to minority contractors on a timely basis. To do this, the Dodge Company has agreed to send daily construction reports on all EDA LPW projects in a specified geographic area to minority assistance groups including OMBE offices, OMBE funded organizations and SBA offices located in those areas. OMBE, SBA and minority contractor groups will disseminate these reports to their clients. The Dodge reports are issued at various stages of bidding and will provide minority contractors with needed project information such as material, service and supply requirements. In 119 cities where the Dodge Company maintains a plans center, minority contractors will be allowed to use the facility during the critical bidding process. Dodge has also agreed to identify on each report projects subject to the 10% MBE requirement. The EDA technical assistance groups will also receive copies of the Dodge reports.

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VI. Complaints

Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office.

PLAINTIFFS' EXHIBIT 2 — GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS (DEEMED MARKED)

U.S. DEPARTMENT OF COMMERCE
Economic Development Administration

LOCAL PUBLIC WORKS PROGRAM, ROUND II

GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS

The 1977 amendment to the Public Works Employment Act (LPW) includes the following requirement with respect to minority business enterprise (MBE) participation:

> Section 106(f)(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprises' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

EDA Policy

EDA ascribes a high priority to the development and support of minority business enterprises and will enforce the

Plaintiffs' Exhibit 2

10% MBE participation requirement strictly. In areas with relatively high minority populations, such as large cities, EDA encourages Grantees to spend substantially more than 10% of grant funds for MBEs to make up for the lower than 10% participation which may take place in those areas with small minority populations.

Grantee Obligation

The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. The grant agreement requires that the Grantee assure EDA that it will expend at least 10% of the amount of each grant it receives for *bona fide* MBEs. Since LPW projects must be performed by private contractors, the Grantee must make sure that at least 10% of the grant funds are expended for MBE contractors, subcontractors or suppliers. The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as "prime contractors") must seek out all available *bona fide* MBEs and make every effort to use as many of them as possible on the project.

An MBE is *bona fide* if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership on which the claim of minority ownership status is based. Similarly, minority participation in a joint venture must also be based on the sharing of real economic interest and must include proportionate control over management, interest in capital and interest in earnings. If the real economic interest in an enterprise or joint venture is represented by debt securities, leasehold interests,

management contracts or other interests owned or controlled by non-minority group members, EDA will analyze the enterprise or joint venture closely to make sure it is a *bona fide* MBE.

An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. For example, a supplier of a heavy material such as concrete pipe would have to be located relatively close to the project because of high transportation costs, while a supplier of relatively expensive, light material could be located far from the project. The market area for any kind of services or supplies depends, therefore, on trade practices; but EDA will require that Grantees and prime contractors engage MBE's from as wide a market area as is economically feasible.

An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

In order to fulfill its obligation to use MBE's, every Grantee should make sure that it knows the names, addresses and

qualifications of all relevant MBE's which would include the project location in their market areas. For this reason, Grantees are urged to call or write any organization which provides minority business development or construction contract assistance in its area. In most cases, Grantees should also hold prebid conferences to which they invite interested contractors and representatives of such MBE support organizations.

Arrangements have been made through the Office of Minority Business Enterprise (OMBE), an agency in the U.S. Department of Commerce which serves as the Federal coordinator and information clearinghouse for minority-owned businesses, to provide assistance to Grantees and prime contractors in fulfilling the 10% MBE requirement. OMBE works closely with and funds numerous minority business organizations which are in regular contact with minority business contractors and suppliers. OMBE's network of 27 Construction Contractor Assistance Centers (CCAC's) specialize in services to construction-related minority firms. Besides providing their clients with technical, marketing and financial assistance, CCAC's also maintain current rosters of minority firms in their areas. A booklet listing these offices is enclosed. Grantees and contractors are also encouraged to use similar non-OMBE-funded minority business organizations for the purpose of locating appropriate minority businesses.

Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration (SBA), and independent agency of the U.S. Government responsible for providing financial, management and other assistance to eligible small businesses. Through its field offices located throughout the U.S., the SBA administers programs designed to assist small and disadvantaged business firms. In addition to offering direct and guaranteed loans and surety bond guarantees for MBE's engaged in the LPW

program, the SBA also licenses venture capital groups, identifies minority businesses through its computerized Minority Vendors Program, and maintains lists of minority firms eligible to do business with the Federal Government. The SBA has Minority Small Business Specialists assigned to many of its offices throughout the country. Grantees and contractors are encouraged to contact SBA offices for help, especially in areas where there is no OMBE office, funded organization or referral agency. A list of SBA offices is also enclosed.

In addition to assuring through its contracting procedures that MBE's obtain at least 10% of the dollar value of the contracts, subcontracts and supply procurements financed by the LPW grant, the Grantee must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. If a shortfall occurs, EDA will suspend the first letter of credit, or refuse to issue the second letter of credit, or, in extreme cases, terminate the grant, unless the Grantee can demonstrate that the shortfall is not its fault or the fault of its prime contractor, or unless the Grantee can demonstrate that the shortfall will be made up during the remainder of the contract. Because of the seriousness of these EDA sanctions, Grantees should administer every project tightly and initiate corrective action promptly if a shortfall in MBE participation seems likely.

Contracting Requirements

LPW projects will be administered through prime contracts involving subcontracts and/or procurement of substantial supplies and simple contracts which do not involve subcontracts or procurement of substantial supplies, or a combination of prime and simple contracts.

In the case of projects to be administered through one prime contract, the 10% MBE requirement would be met if the

prime contractor is an MBE or if at least 10% of the grant funds are expended for MBE subcontractors or suppliers. In the latter case, the Grantee must make sure that the prime contractor does so expend at least 10% of the grant, and the Grantee may not enter into a prime contract which does not contain an assurance that the MBE requirement will be met. Such an assurance is contained in EDA's *Supplemental General Conditions for Local Public Works Round II Projects,* which are to be made part of all prime contracts. Any such prime contract must also include a list of the names and addresses of the MBE's to be used and the amount of grant funds to be expended for each such MBE.

When prime contractors are selected through competitive bidding, the Grantee must require that each bid include a commitment to use at least 10 percent of the contract funds for MBE's. Each such bid shall also indicate the name of each MBE the bidder will use, the work to be performed by it, and the total percentage of the contract the bidder will expend in the aggregate for all such MBE's. Bids shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's. Within 5 days after the bid opening and after the apparent lowest responsive bidder is notified, it must submit to the Grantee the names of each MBE the bidder will use, the work to be performed by it, and the amount of contract funds to be paid to it.

EDA also encourages Grantees and prime contractors to select contractors by negotiation or by a bidding procedure limited to MBE's whenever possible under State law. Upon request, EDA will waive Federal competitive bidding requirements when Grantees determine that other contractor selection procedures constitute effective means of achieving at least 10% MBE participation.

In the case of projects involving more than one contract, the Grantee may fulfill its 10% MBE requirement in any of several

ways. Some of the contractors may themselves be MBE's—for example, contracts for engineering or other professional or supervisory services, or for landscaping, accounting or guard services. Some prime contracts may be with MBE's or may contain assurances for 10% MBE participation or for more than 10% MBE participation, with appropriate supporting names and addresses of MBE subcontractors or suppliers. Other prime contracts may provide for less than 10% MBE participation. Unless the Grantee can assure 10% MBE participation by other means, the bidding procedures described above will be applicable to all selections of prime contractors through competitive bidding. Grantees administering projects involving more than one contract are also encouraged to use other contractor selection procedures where appropriate. In any event, it is the Grantee's obligation to make sure that at least 10% of the grant funds as a whole will be expended for MBE's through its own simple or prime contracts or through the subcontracts or supply contracts of its prime contractors.

Grantee Reports

In order that EDA may monitor MBE participation on a grant-by-grant basis and a nationwide basis, Grantees are required to submit several sets of reports to EDA, addressed to the appropriate Regional Director, *Attention: Civil Rights Division.*

Initial Report. Before the first letter of credit is issued, the Grantee must submit a report on Form ED-530, Part A, which sets forth:

(a) The name and address of each MBE contractor with which the Grantee has already signed a contract and which describes the work to be done or

materials to be furnished by the MBE and states the amount of contract funds to be paid to the MBE.

(b) Similar information with respect to MBE subcontractors or suppliers under any prime contract which the Grantee has already signed. The low bidding prime contractor must furnish that information to the Grantee before the prime contract can be signed.

(c) Similar information with respect to any simple or prime contract which the Grantee expects to make at a later date. Usually this information can only be an estimate. If the Grantee's estimate proves to be wrong when subsequent contracts are made and it appears that the 10% MBE requirement may not be met, the Grantee should immediately advise the appropriate EDA regiional office to determine how the possible shortfall can be accommodated.

EDA will check each report to determine whether the information on the report demonstrates that at least 10% of the grant funds will be expended for MBE's. If the report does not so demonstrate, no letter of credit will be issued. While EDA will accept the information furnished by the Grantees at face value for purposes of determining eligibility for a letter of credit, EDA will verify that information during the construction period by comparing the information on the initial Form ED-530, Part A, report with the Form ED-530, Part B, certificates which are submitted later and with the second Form ED-530, Part A,

report filed at 40% project completion. EDA will also spot-check Grantee and prime contractor compliance.

40% Completion Report. Upon completion of 40% of each project, each Grantee must submit a second report on Form ED-530, Part A, describing actual MBE participation up to that point on the basis of executed contracts and subcontracts with MBE's which are still in full force and effect, and estimating any future MBE participation on the basis of any contracts and subcontracts which the Grantee or a prime contractor expects to make with MBE's during the remainder of the project construction period.

The 40% Completion Report must demonstrate MBE participation to the extent of at least 10% of the grant funds in order for EDA to issue the second project letter of credit. If that report indicates that there will be a shortfall, EDA will not issue a second letter of credit and will consider terminating the grant, unless the Grantee can justify the shortfall in MBE participation by demonstrating that it was not the Grantee's fault or the fault of one of its prime contractors. In evaluating any such justification which claims that a MBE contractor, subcontractor or supplier was terminated for failure to perform, EDA will consider whether the Grantee and any relevant prime contractor have furnished all feasible technical assistance, including assistance with bonding and working capital, to help the MBE perform its contracts.

MBE Certifications. The Grantee must secure a statement from each minority firm participating in each project as a contractor, subcontractor or supplier, on Form ED-530, Part B, certifying that the minority firm is a *bona fide* minority business enterprise and that the minority firm has executed a binding contract to provide a specific service or material to the project for a specific dollar amount. The Grantee must secure and

submit this statement to EDA as soon as the minority firm has executed a binding contract. EDA will spot-check such certificates to make sure that the participating MBE is *bona fide.*

Copies of the Form ED-530, Parts A and B, are included with this package. Additional copies are available from EDA Regional Offices. The Grantee must send the initial report, the 40% completion report, and certifications from minority firms to the Regional Director, *Attention: Civil Rights Division,* at the appropriate EDA Regional Office.

Waivers

Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBEs. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. EDA will consider the degree to which the Grantee and potential contractors have used available referral sources and related assistance in evaluating waiver requests.

Some State or local laws involving bidding procedures or other matters may make fulfillment of the 10% MBE requirement difficult for some Grantees. It is the responsibility of each Grantee to find ways of achieving 10% MBE participation regardless of such laws. If qualified, *bona fide* MBE's are available, EDA will not grant a waiver of the 10% MBE requirement because of difficulties caused by State or local law.

Only the Grantee can request a waiver. Ordinarily a waiver request will be considered only after the Grantee and its prime contractors have taken every feasible action to achieve at least 10% MBE participation. For example, if the Grantee or its prime contractors have taken all feasible steps to locate relevant MBE's and have requested all available qualified MBE's to participate as contractors, subcontractors or suppliers and not enough MBE's can or will participate to reach the 10% MBE participation goal, a waiver request detailing the efforts of the Grantee and its prime contractor may be necessary in order for the project to proceed. Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful.

Waiver requests will also be entertained during the construction period if one or more MBE's which were committed to participate fail to do so through no fault of the Grantee or any of its prime contractors.

Finally, a Grantee situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects if it can show that there are no relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project. It should be noted, however, that there may be relevant, available, qualified minority business enterprises for some types of projects in some areas and no such enterprises for other types of projects in those same areas. Therefore, waivers shall be granted only on a project-by-project basis.

In evaluating any request for a waiver, EDA will check all available sources including CCAC's, other OMBE-funded organizations and relevant non-OMBE-funded minority business organizations to determine whether the requesting Grantee and

its prime contractors have made all feasible efforts to locate and enter into contracts or subcontracts with MBE's and to assist MBEs in performing contract services or in furnishing contract supplies. A waiver will be granted only when EDA is satisfied that fulfillment of the 10% MBE requirement is not feasible and that the Grantee and its prime contractors have in no way frustrated fulfillment of that requirement.

Technical Assistance

The staffs of all OMBE affiliates and all SBA offices and the Civil Rights and LPW staffs of EDA Regional Offices are available to assist Grantees, prime contractors and MBE's themselves in achieving maximum MBE participation in the LPW program. EDA has funded special supplemental staff in SBA offices to facilitate SBA assistance in surety bond guarantees and working capital loans. In addition, the staffs of the EDA-funded University Resource Centers are prepared to furnish technical assistance to MBE's in bidding and other business and technical areas. A list of those centers and their addresses is attached.

PLAINTIFFS' EXHIBIT 4 — CITY OF NEW YORK — LIST OF PUBLIC WORKS PROJECTS SUBMITTED TO THE ECONOMIC DEVELOPMENT ADMINISTRATION FOR FUNDING UNDER ROUND II OF THE LOCAL PUBLIC WORKS CAPITAL DEVELOPMENT AND INVESTMENT PROGRAM

CITY OF NEW YORK

LIST OF PUBLIC WORKS PROJECTS SUBMITTED TO THE ECONOMIC DEVELOPMENT ADMINISTRATION FOR FUNDING UNDER ROUND II OF THE LOCAL PUBLIC WORKS CAPITAL DEVELOPMENT AND INVESTMENT PROGRAM

JULY 13, 1977

Plaintiffs' Exhibit 4

BRONX

PS 44, 102, 106 Modernization (BE-101)	$ 3,249,881
PS 175 Playground Rehabilitation (BE-130)	284,540
Street Reconstruction Third Avenue from 161st St. to Cross Bronx Expressway (THW-102)	4,133,359
Bussing Ave., Sewers and Street Reconstruction (THW-119)	1,489,968
Albert Einstein Peripheral, Sewers and Street Reconstruction (THW-130)	1,593,413
Bronx Zoo Orientation/Primate Building, New Building (PW-116)	4,693,266
Miscellaneous upgrading work at the following schools: Walton H.S., A.E. Smith H.S., PS 73, PS 117, PS 75 (BE-135)[1]	1,730,000
Miscellaneous upgrading work at the following schools: PS 60, PS 100, PS 133, Clinton H.S., J.F.K. Photo Lab., J. Monroe H.S., PS 63, PS 138, PS 33 (BE-136)[1]	1,878,541

[1]Part of a joint application with Staten Island (BE-134 $2,128,857 Total)[1]

[1]Part of a joint application with Brooklyn ($3,591,541 Total)

Plaintiffs' Exhibit 4

Installation of Yankee Stadium Regulator (DWR-128)	364,000
Construction of parking deck at Jerome Ave. and Gunn Hill Road (PW-128)	2,035,022
Reconstruction of City Island Bridge (THW-135)[1]	3,886,000
[1]Part of a joint application with Manhattan ($4,129,994 Total)	
Continuation of New Gateway and Orientation Facility for New York Botanic Gardens (PW-129)	2,029,989
TOTAL	$27,367,979

Plaintiffs' Exhibit 4

BROOKLYN

IS 246 Modernization (BE-107)	$ 1,857,809
Murrow HS II Shops (BE-126)[1]	1,600,000
[1]Joint application with Susan Wagner HS Shops Staten Island ($2,449,231 Total)	
Street Reconstruction in Church Avenue from East 52nd Street to Kings Highway, New York Avenue, etc. (THW-108)	2,349,777
Street Reconstruction in Broadway from Roebling Street to Marcy Avenue, Broadway from Rodney Street to DeKalb Avenue (THW-111)	3,285,389
Street Reconstruction in McDonald Avenue from Cortelyou Road to Avenue X, Shell Road, etc. (THW-109)	6,334,242
Street Resurfacing Boro-Wide (THW-125)	1,949,153
50th St. from 17th to 18th Ave. etc. and Belmont Ave. from Cleveland St. to Jerome St. Sewers (DWR-108)	784,000
Rehabilitation of Irrigation System, Brooklyn Botanic Garden (DPR-102)	539,000
Modernization of the following schools: PS 195, JHS 240, PS 269, PS 286 (BE-138)	1,997,075

Plaintiffs' Exhibit 4

Miscellaneous upgrading work at the following schools; PS 149, PS 49, PS 138, JHS 201, PS 51, Automotive HS, PS 259, PS 156, JHS 166, JHS 232 (BE-134)	3,070,158
Miscellaneous upgrading work at the following schools: JHS 293, John Jay HS, PS 197, FDR HS, JHS 136, 65 Court St., PS 274, JHS 35, Prospect Hts. HS, Tilden HS, PS 316 (BE-136)[1]	1,713,000
[1]Part of a joint application with the Bronx (BE-136 $3,591,541 Total)	
Renovation of Coney Island Broadwalk between W. 12th St. and W. 22nd St. (DPR-112)[1]	1,081,000
[1]Part of a joint application with Queens (DPR-112 $2,163,000 Total)	
Renovation of Kaiser Park Seawall and Promenade (DRP-113)	1,250,000
Renovation of Brooklyn Communications Office (PW-124)	1,065,342
Miscellaneous Rehabilitation and Renovation work in the Brooklyn Academy of Music (PW-120)	2,385,680
Renovation of Shore Boulevard Bulkhead (THW-132)	1,473,000

Plaintiffs' Exhibit 4

Rehabilitation of Manhattan Bridge Plaza (THW-142)	469,619
Renovation of Abraham Lincoln HS Athletic Field (BE-141)	759,850
TOTAL	$33,964,394

Plaintiffs' Exhibit 4

MANHATTAN

Street Resurfacing Boro-Wide (THW-123)	$ 3,045,760
Renovation of Harlem Hospital "K" Building (HHS-104)	4,999,000
Replace 48" Water Main and Street Reconstruction - First Avenue, Houston Street to 22nd Street (THW-117)	3,350,000
125th Street Parking Garage (MOD 101)	4,076,102
Modernization of PS 42 (BE-137)	1,274,077
Miscellaneous upgrading work at the following schools: (BE-133)	557,604
Part of a joint application with Queens ($3,154,604 total)	
PS 99	
Washington Irving H.S.	
Renovation of South Street Seaport Museum - Block 96 West - Facades and in fill Building (PW-126)	2,868,395
Renovation of several piers at South Street Seaport Museum (EDA-116)	2,500,000
Construction of Central Book Stacks and Automatic Book Lift System, New York Public Library (PW-125)	1,453,060

Plaintiffs' Exhibit 4

Renovation of Broadway Bridge (THW 135)[1]	243,994
[1]Part of a joint application with the Bronx	
Nassau St. Mall, Pace Plaza, Beekman to Spruce, John to Maiden Lane and Legion Square Repaving (THW-139)	804,073
TOTAL	$25,172,065

Plaintiffs' Exhibit 4

QUEENS

PS 159 Modernization (BE-112)	$ 1,177,722
Street Resurfacing Boro-Wide (THW-126)	2,350,685
Bell Boulevard, Sewers and Street Reconstruction (DWR-114)	4,892,580
Maspeth Avenue, Sewers and Street Reconstruction (DWR-118)	1,025,775
80th Street, Sewers and Street Reconstruction (DWR-115)	887,233
Seagirt Boulevard, Sewers (DWR-107)	5,374,500
Baisley Boulevard, Sewers (DWR-110)	4,832,000
Painting and Rehabilitation of Queensboro Bridge (THW-129)	3,748,380
Beach Channel H.S. Seawall and Dock Dike (BE-131)	981,682
Miscellaneous upgrading work at the following schools (BE-133)[1]	2,597,000
PS 177 — Hillcrest Ave.	
PS 99 — LIC H.S.	
PS 36 — PS 95	
PS 132 — PS 101	
JHS 157 — PS 156	
PS 70 — PS 151	
PS 221 — JHS 180	

Plaintiffs' Exhibit 4

PS 145 — Richmond Hill H.S.	
PS 77 — John Bowne H.S.	
[1]Part of a joint application with Manhattan (BE-133 $3,154,604 total)	
Renovation of Rockaway Broadwalk from Beach 100th St. to Beach 108th St. (DPR-112)	1,082,000
Part of a joint application with Brooklyn ($2,163,000 Total)	
Combined overflow sewers in 124th St. (DWR-120)	5,271,000
TOTAL	$34,220,557

Plaintiffs' Exhibit 4

STATEN ISLAND

Susan Wagner High School Shop (BE-126)[1]	$ 849,231
[1]Joint application with Murrow H.S. Shops Brooklyn ($2,449,231 Total)	
Street Resurfacing Boro-Wide (THW-127)	2,065,921
Benton Avenue, Sewers and Street Reconstruction (DWR-116)	1,228,496
Mason Avenue, Sewers and Street Reconstruction (DWR-103)	4,419,350
North Railroad Avenue Sewers and Street Reconstruction (DWR-119)	3,292,350
Lynhurst Avenue, Tysens Lane (DWR-102)	1,861,970
Victory Boulevard, Sewers (DWR-105)	4,791,300
Miscellaneous upgrading at Curtis H.S. (BE-135)[1]	398,857
[1]Part of a joint application with the Bronx (BE-135 $2,128,857 Total)	
Raymond Place, Sewers and Street Reconstruction (DWR-122)	2,657,880
Renovation of St. George Transportation Terminal - Ramp "B" (THW-136)	1,761,429

Plaintiffs' Exhibit 4

Reconstruction of Ferry Racks St. George Transportation Terminal (TFA-104)	2,100,000
TOTAL	$25,426,784

Plaintiffs' Exhibit 4

CITY-WIDE

Rehabilitation of Sedimentation Tanks and Installation of Waste Heat Boilers at Newtown Creek (DWR-101)	$ 3,034,000
Miscellaneous Roofing Work and Rehabilitation of House of Detention for Men for Contact Visits (PW-102)	1,153,992
Construction and Reconstruction of Municipal parking facilities at the following locations: Astoria, Flushing #1, Jamaica #2, Jamaica #3, Rego Park #1, Rego Park #2, Gowanus 36th-53rd St., Ave. M, Queens Village (PW-111)	1,685,539
Painting of Various Waterway Bridges (THW-122)	1,966,127
Rehabilitation of Various Tennis Courts (DPR-101)	700,000
Removal of Dead and Dying Trees (DPR-106)	1,429,000
Surrogate's Court Rehabilitation, Exterior Work and Conversion of Municipal Reference and Research Center, Improved Access for the Handicapped in Three City-owned buildings (PW-115)	1,370,850
Renovation of Lehman, Queens, Bronx Community and Staten Island Community Colleges (BHE-102)	1,021,335

Plaintiffs' Exhibit 4

Development of Yankee Stadium parking lot No. 13 (PW-122)	2,175,011
College Point Industrial Park, Drainage and Street Work (EDA-109)	2,150,000
New York Terminal Market, Expand Buildings B4 and C4 (EDA-108)	3,604,000
Rehabilitation and adaptation for the handicapped of various comfort stations - City-wide (DPR-115)	1,883,000
Miscellaneous rehabilitation and upgrading in various correctional institutions (PW-121)	1,097,812
Miscellaneous energy conservation improvements in City-owned Buildings (PW-118)	1,076,250
Heating and Fuel Storage at 110 Firehouses (PW-123)	1,078,163
Rehabilitation - Fresh Kills Landfill Structural Systems (SAN-110)	2,650,140
Renovation and Repair of Tweed Courthouse Roof and Skylight (PW-130)	374,719
Improvements for access of the Handicapped in various Municipal Hospitals (HHC-105)	1,881,495
Expansion and Improvement of existing Krasdale Foods Warehouse at Hunts Point (EDA-114)	4,200,000

Plaintiffs' Exhibit 4

Improvement to Howland Hook Marine Terminal (EDA-112)	4,545,000
Northeast Marine Terminal Improvements (EDA-113)	3,420,000
Renovation of Marine Transfer Stations W. 135th Street and 52nd Street (SAN-109)	1,707,750
High Pressure Sodium Street Light Conversion (PW-113)	1,510,038
TOTAL	$45,714,221
GRAND TOTAL	$191,866,000

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 19, 1977 (WERKER, J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5786 (HFW)

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK, THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION AND BOARD OF EDUCATION OF THE CITY OF NEW YORK and HEALTH AND HOSPITALS CORPORATION,

Defendants.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

APPEARANCES:

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Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

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By: Mary E. Daly
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Gerald Hartman, Department of Justice

WERKER, District Judge.

The plaintiffs in this civil rights action, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work, by order to show cause seek declaratory and injunctive relief to prevent the Secretary of Commerce, as the program administrator, and the remaining defendants, as potential

project grantees, from enforcing section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (the "Act"), which requires 10 percent minority business enterprise participation in any local public works project funded thereunder.[1] Plaintiffs allege in their complaint that section 103(f)(2) of the Act (the "MBE requirement") violates the equal protection clause of the fourteenth amendment and hence also the due process clause of the fifth amendment.[2] Plaintiffs further allege that the MBE requirement is violative of the clear Congressional policy underlying the Civil Rights Acts of 1866 and 1964.

Similar allegations have recently been considered in several other districts.[3] It appears, however, that none of those courts

1. Under section 103(f)(2) of the Act a minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members, are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

2. Although the fifth amendment contains no express equal protection clause, it has been held that the due process clause of that amendment incorporates fourteenth amendment equal protection elements. *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040 48 L. Ed.2d 597 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

3. *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977); *Ohio Contractors Association v. Economic Development Administration*, No. 77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association v. Higgins*, 439 F. Supp. 1331 (D. Mont. 1977); *Associated General Contractors of Wyoming, Inc. v. Secretary of Commerce*, No. 77-222 (D. Wyo. Nov. 4, 1977); *Florida East Coast Chapter of the Associated General Contractors of America v. Secretary of Commerce*, No. 77-8351 (S.D. Fla. Nov. 3, 1977); *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Calif. 1977); *Constructors Association of Western Pennsylvania v. Kreps*, 441 F. Supp. 936 (W.D. Pa. Oct. 13, 1977).

have reached a final decision on the merits and, as a consequence, this may well be the first decision squarely holding that the MBE requirement is an entirely constitutional method of remedying prior acts of discrimination in the construction industry and one which is fully consistent with the civil rights laws that preceded it.[4]

BACKGROUND

The complaint in this action was filed on November 30, 1977 and an initial hearing on plaintiffs' order to show cause was held the same day. At the close of that hearing, the Court denied plaintiffs' request for a temporary restraining order and, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, set the matter down for a consolidated hearing on the application for a preliminary injunction and trial on the merits the following day. The court further directed that each defendant file a memorandum of law at the time of the preliminary injunction hearing and trial.[5] That proceeding took place on November 31 and December 2, 1977, and further memoranda have since been filed. Although the Secretary has expressed concern about the speed with which this matter proceeded to a trial, that issue, quite obviously, has been mooted by the determination reached herein.

4. In *Wright Farms, supra,* Judge Coffrin set down a hearing on a preliminary injunction and trial on the merits for December 12, 1977. There is no indication, however, that he has yet issued any opinion following that proceeding.

5. At the time of the initial hearing, plaintiffs had not served the Health and Hospitals Corporation of the City of New York, the New York City Board of Education or the New York City Board of Higher Education, each of which is a separate governmental entity. Accordingly, the Court directed that by 5:00 p.m. the following day each of these defendants be personally served with plaintiffs' complaint and accompanying papers. At the consolidated hearing and trial, Theodore Gilbert, Esq., an Assistant Corporation Counsel for the City of New York, entered an additional appearance on behalf of the Board of Education, but no one has appeared for either the Board of Higher Education or the Health and Hospitals Corporation.

HISTORY OF THE MBE REQUIREMENT

The Act was passed to extend the provisions of Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94—369, 90 Stat. 999—1012 (1976), under which Congress appropriated $2 billion to stimulate the national economy and the sagging construction industry by providing direct grants to state and local governments for the construction of public facilities which would immediately create a substantial number of jobs.[6] See H.R.Rep.No.1077, 94th Cong., 2d Sess. (1976). To assure that the program would actually be of direct benefit to the construction industry, the Act added a requirement that private firms, and not governmental units, perform any work funded. Act §103(e)(1), 42 U.S.C. §6705(e)(1); H.R.Rep.No.20, 95th Cong., 1st Sess. 4 (1977). An additional expenditure of $4 billion for construction projects was authorized under section 109 of the Act, 42 U.S.C. §6708, and Congress subsequently appropriated $2 billion for that purpose under what is commonly known as "Round Two" of the Local Public Works Program. Economic Stimulus Appropriations Act, Pub.L. No. 95—29, 91 Stat. 122, 124 (1977).

When the Act was being considered on the floor of the

6. In the City of New York alone, $193,838,646 has been awarded for 83 projects to be built under the Act. It has been estimated that the New York City projects will generate "approximately 6,348,842 hours of employment, the equivalent of a full year of employment for 5039 construction workers." It is further anticipated that these projects will generate the equivalent of a full year of employment for 1618 workers in construction-related industries. Spending generated by these individuals and their employers is expected to produce at least an additional 18,644 person years of employment. Affid. of Anthony J. Sulvetta, Chief of the Program Analysis Division of the Economic Development Administration, sworn to Dec. 1, 1977, at 2, 4. The impact of Act-funded projects on the national economy is equally dramatic. *Id.* at 4-5.

House, Representative Parren Mitchell of Maryland introduced an amendment subsequently incorporated into the Act as the MBE requirement. *See* 123 Cong.Rec. H 1437—41 (daily ed. Feb. 24, 1977). That provision, in its present form, reads as follows:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

The Secretary of Commerce, pursuant to authority granted her under section 107 of the Act, 42 U.S.C. §6706, has also promulgated regulations to carry out the terms of the MBE requirement while still affording an escape mechanism to contractors doing business in areas where compliance with the 10 percent set-aside is impossible.[7] Under the regulations, a project *grantee,* not the contractor, can seek a waiver of the MBE requirement when it first applies for a grant or, if

7. The regulations, which appear at 42 Fed. Reg. 27,434-35 (1977) (to be codified in 13 C.F.R. §317.19), provide in pertinent part as follows:

> (b) Minority business enterprise. (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

necessary, at any later time—provided that sufficient supporting information is furnished to the reviewing officer. *See* Affid. of M.L. Banner, Chief of the Atlantic Regional Office of the Economic Development Administration, sworn to December 5, 1977. Moreover, the Department of Commerce has issued two sets of interpretive guidelines and a technical bulletin to assist project grantees in their efforts to comply with the MBE requirements.[8]

DISCUSSION

A. *Constitutionality of the Act.*

The first issue presented to the Court is whether the MBE requirement incorporates a constitutionally impermissible racial or ethnic quota, as plaintiffs suggest, or merely, as defendants argue, a legislative preference intended to remedy the adverse effects of past or present discrimination. Although the Secretary of Commerce steadfastly maintains that the MBE requirement should be considered as a goal which can be waived "where facts show that enforcement would be impractical,"[9] Secretary's Memorandum in Opposition to Plaintiffs' Motion at 13, and presumably that it should therefore be subject to some lesser standard, the Court need not enmesh itself in the goal

8. Economic Development Admin., U.S. Dep't of Commerce, Guidelines for Round II of the Local Public Works Program (June 1977); Guidelines for 10% Minority Business Participation in LPW Grants (Aug. 1977); Minority Business Enterprise Technical Bulletin (Oct. 1977).

9. The Secretary's argument is, in this regard, overstated, for waivers are only granted "under exceptional circumstances." Guidelines for 10% Minority Business Participation in LPW Grants, *supra*, at 13. One court has accurately described the waiver criterion as one of practical impossibility. *Ohio Contractors Association v. Economic Development Administration*, slip op. at 14.

versus quota controversy, for resolution of the constitutional question presented by the plaintiffs would not be advanced one iota by such an exercise. No matter how the MBE requirement is characterized, it cannot be denied that it distinguishes among various business enterprises, at least in part, based upon the racial background of their principals. Consequently, since its operation involves the use of an inherently "suspect" classification, rigid scrutiny of both Congressional purpose and the means selected to effectuate that purpose is clearly mandated. *See Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Two standards must therefore be met under the traditional formulation. First, the governmental objective advanced by the Act must be shown to serve a "compelling state interest." *See Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); second, defendants must demonstrate that other available means of accomplishing the objective would not, in practice, prove to be less discriminatory.[10] *Dunn v. Blumstein*,

10. The Secretary contends that the proper standard for evaluation of legislative classifications that are inherently suspect has been recently set forth in *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855, 37 L. Ed.2d 910 (1973), under which the United States need only show:

> that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary to the accomplishment" of its purpose or the safeguarding of its interest. (Footnotes omitted.)

The Supreme Court expressly noted, however, that characterizing the requisite state interest as "overriding" or "compelling" or "substantial" signifies no substantive distinction, *id.* at 722 n. 9, 93 S. Ct. 2851. Furthermore, the Court sees no real difference between the *Griffiths* requirement that the classification be necessary and the concept that the classification must be narrowly drawn. The Court therefore adheres to the more frequently cited rigid scrutiny formula.

405 U.S. 330, 337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Loving v. Virginia,* 388 U.S. at 11, 87 S.Ct. 1817; *Associated General Contractors of California v. Secretary of Commerce,* 441 F.2d at 964. It is the Court's view that both of these requirements have been met in this action.

1. *Compelling Interest Analysis.* Plaintiffs concede that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," Plaintiffs' Memorandum in Support of Preliminary Injunction at 10, but argue that the formal legislative history of the Act is devoid of any indication that Congress wished to assist minorities, rather than economically disadvantaged groups in general. *Id.* at 965. The Congressional purpose underlying enactment of the MBE requirement cannot be discerned merely by examining the reports of the Senate and House committees that considered the Act, however, because the minority business set-aside was not proposed until a relatively late date in the draft bill's history and was therefore never considered by any Congressional committee. *See Associated General Contractors of California v. Secretary of Commerce,* 441 F.2d at 969. Thus, even though the House Public Works and Transportation Committee called for federally financed or assisted public works projects as a "dual purpose instrument to help revitalize the Nation's financially-pressed communities and reactivate the distressed construction industry," H.R.Rep.No.20, 95th Cong., 1st Sess. at 1, there may well be other, equally important reasons for passage of the Act by Congress. As Professor Dickerson has aptly noted, there is frequently "a congeries of purposes" behind a bill. R. Dickerson, The Interpretation and Application of Statutes 89 (1975). It is therefore necessary, in the Court's view, to consider both the "debate rhetoric" surrounding introduction of the MBE requirement and the societal and legislative context within which that provision was meant to operate. *See Katzenbach v.*

Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) in which the Court discussed what Congress *might have found* in enacting challenged legislation.

Turning first to the floor debate, the Court finds that the remarks made in support of the MBE requirement indicate an intent to remedy prior wrongs to minority assist economically pressed construction contractors, subcontractors and vendors. For example, Representative Mitchell noted in his remarks that the federal government's program of assistance to minority businesses permits them to become "viable entities in our system" only to be "cut off" when contracts are awarded, and he added that "the only way that we are going to get the minority enterprises into our system" is by setting aside funds. 123 Cong.Rec. H 1437 (daily ed. Feb. 24, 1977). Representative John Conyers of New York, who also spoke in favor of the Mitchell amendment, observed perhaps a bit more directly that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time." Id.* at H 1440 (emphasis added). *See also* remarks of Representative Biaggi at *id.* ("Nation's record with respect to providing opportunities for minority businesses is a sorry one"); and remarks of Senator Brooke, *id.* at S 3910 (daily ed. Mar. 10, 1977) (noninvolvement of minority business exists despite legislation, executive orders and regulations).

It is true that these statements do not expressly attribute the difficulties encountered by minority business enterprises to prior racial discrimination, but whatever ambiguity is present is easily resolved when the available empirical data is examined. Thus, although the United States has a minority population of approximately 17 percent, only about four percent of all businesses are controlled by members of minority groups, and they account for less than one percent of national gross business receipts. Office of Minority Business Enterprise, United States

Dep't of Commerce, Minority Business Opportunity Handbook at I—1 (August 1976) ("Minority Handbook").[11] Minority businesses also receive less than one percent of the $120 billion in government contracts awarded annually. United States Comm'n on Civil Rights, Minorities and Women as Government Contractors 2, 6 n. 10 and 86 (May 1975). Plaintiffs question the soundness of the data contained in the reports relied upon by the Secretary, and point to recent increases in the number of minority businesses and the amount of their dollar receipts,[12] Plaintiffs' Post-Trial Memorandum at 10, but even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to have concluded that "the severe shortage of potential minority entrepeneurs with general business skills is a result of their historic *exclusion* from the mainstream economy." *See* Minority Handbook at I—1—2 (emphasis added).

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11. A House committee recently suggested slightly different statistics:

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only 16.6 billion or about 0.65 percent was realized by minority business concerns.

Report of the House Committee on Small Business, H. R. Rep. No. 1791, 94th Cong., 2d Sess. 124 (1977).

12. Between 1969 and 1972, the number of minority owned construction firms increased by 34 percent while gross receipts for such firms rose 84 percent. Bureau of the Census, U.S. Dep't of Commerce, 1977 Survey of Minority-Owned Business Enterprises (May 1975).

In fact, it appears that a House subcommittee has made that very finding. In reviewing the record of certain federal programs for minority business enterprises, the House Subcommittee on Small Business Administration Oversight and Minority Enterprise observed that:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.

Report of the House Committee on Small Business, H.R.Rep.No.1791, 94th Cong., 2d Sess. 124 (1977).

The subcommittee furthermore noted that

> over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, ~~in~~ particular.

Id. at 182

Where there is, as here, a statistical disparity between the representation of minority groups in the general population and

the degree of their involvement in economic activity, the Court believes that Congress could reasonably believe that prior racial discrimination was the cause.[13] *See, e.g., Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768, 45 U.S.L.W. 4882 (U.S. June 28, 1977); *Constructors Association of Western Pennsylvania v. Kreps,* 441 F.Supp. 936. However, even if the members of Congress were not aware of the relevant statistical information at the time that they adopted the MBE requirement, certainly they must have acted with knowledge of the many federal antidiscrimination measures implemented over the past several years.[14] When the Mitchell amendment is considered against the background of those programs, it becomes rather obvious that the MBE requirement was incorporated into the Act after only brief debate because of a general awareness of the compelling need for legislative action capable of overcoming the effects of prior discrimination against minority businesses seeking to

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13. Plaintiffs contend that under *Equal Employment Opportunity Commission v. Local 14,* 553 F.2d 251, 255 (2d Cir. 1977), the Secretary should only be entitled to marshal post-1965 statistics since Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000d and 2000e *eq seq.,* were not effective prior to then. The question before the Court, however, is what Congress could rightfully infer as to the reason for the poor showing of minority enterprises in our national economy; passage of the Civil Rights Act of 1964 is entirely irrelevant in that regard.

14. Judge Snyder catalogued many of the federal programs in *Constructors Association of Western Pennsylvania v. Kreps,* op. at 951 n. 8, and the reader is referred to that source for a summary description of the federal effort. The Secretary maintains that there are some 35 federal assistance programs designed particularly for minority enterprises. *See* Office of Minority Enterprise, U.S. Dep't of Commerce, Federal Assistance Programs for Minority Business Enterprises (1977).

participate in government contracting.[15]

None of the evidence introduced at the hearing held in this matter even remotely suggests a contrary conclusion. At best, the testimony shows that construction contractors in the New York City area have not engaged in any concerted effort to discriminate against minority subcontractors and venders.[16]

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15. Plaintiffs contend that the federal amelioratory scheme consists of remedies, which "cannot be substituted for the necessary clear basis of legislative findings and reliance to validate this act." Plaintiffs' Post-Trial Memorandum at 13-14. However, the critical issue before the Court is not whether Congress, in enacting the MBE requirement into law, actually made an express finding that there was prior racial discrimination in the construction industry; the issue, more properly, is whether such a finding would have been justified. As the Supreme Court noted in *Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S. Ct. 1717, 1725, 16 L. Ed.2d 828 (1966), "any contrary conclusion would require us to be blind to the realities familiar to the legislators." *Cf. Ohio Contractors Association v. Economic Development Administration,* slip op. at 17 (Court need not explore whether particular legislative act in question actually serves compelling interest so long as it falls within confines of well-established state interest.

16. Plaintiffs proffered the testimony of two construction contractors whose firms had submitted bids for projects funded under the Act. Both witnesses stated that their firms had been the successful bidder on projects requiring minority business enterprise participation and intended to submit further bids for additional Act-funded projects; that the 10 percent MBE requirement made it necessary for them to deal with minority subcontractors and venders whom they would not otherwise employ in connection with specified projects; and that they had each used minority venders or subcontractors on previous projects even though that was not required by the bid specifications for those projects. The sole witness for the Secretary was an Assistant Commissioner of the New York State Commission on Human Rights who, in essence, conceded on cross examination that he knew of no concerted effort by construction contractors to discriminate against minority business enterprises in the City of New York.

(Cont'd)

Although a host of labor union discrimination cases make that proposition rather dubious,[17] even if it were to be accepted, *arguendo,* based upon the disgraceful record of minority enterprise involvement in our national economy, Congress could still find that racial discrimination against minority businesses remained a serious problem in many *other* areas of the country. And as even plaintiffs have admitted, that is a problem the

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One of the construction contractors testified that he was meeting the MBE requirement for construction of a tide gate regulator by purchasing the mechanical equipment at somewhat increased cost from a minority vender, rather than acquiring it directly from the manufacturer as he normally would. Transcript at 39-40. At the time of the hearing, the Court was rather critical of this practice, which it suggested really amounted to incorporation of a welfare program within a public works project. Transcript at 66. According to the Secretary's published guidelines, however, "only the commission or fee earned by the MBE may be counted toward the 10% requirement" when the MBE "acts merely as an agent or a relatively passive conduit in connection with the provision of services or materials." Indeed, "even this commission or fee will not be counted if the MBE performs no substantive services and is a totally passive conduit." Minority Business Enterprise Technical Bulletin, *supra,* at 3-4. This restriction may make it even more difficult for nonminority contractors to comply with the MBE requirement but it certainly resolves any concern the Court may have had over possible squandering of federal funds. Furthermore, the restriction increases the likelihood that minority firms will be involved in large-scale construction projects in a meaningful way.

17. *E.g., EEOC v. Local 638,* 401 F. Supp. 467 (S.D.N.Y. 1975), *modified,* 532 F.2d 821 (2d Cir. 1976), *aff'd after remand,* 565 F.2d 31 (2d Cir. 1977); *United States v. Local 638, Enterprise Association Steamfitters,* 360 F. Supp. 979 (S.D.N.Y. 1973), *modified sub nom. Rios v. Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *United States v. Local 638, Enterprise Association Steamfitters,* 347 F. Supp. 169 (S.D.N.Y. 1976); *United States v. Wood Wire & Metal Lathers, Local 46,* 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939, 93 S. Ct. 2773, 37 L. Ed.2d 398 (1973).

federal government certainly has a compelling interest in resolving.

2. *Effective yet narrowly drawn means.* The critical question therefore becomes whether Congress adopted the least discriminatory method of accomplishing its concededly legitimate objective. In this regard, plaintiffs urge that the defendants could achieve the apparent purpose of Congress, with less imposition on nonminority persons, through greater use of (1) cash advances to minority contractors pursuant to 41 C.F.R. §1—30.400 *et seq.* (1977), and (2) section 8(a) of the Small Business Act, 15 U.S.C. §637(a), under which government procurement contracts are let to the Small Business Administration and are then fulfilled through noncompetitive subcontracts to "small business concerns owned and controlled by socially or economically disadvantaged persons." *See* 13 C.F.R. §124.8—1(b) (1977). Plaintiffs further contend that a set-aside for all disadvantaged enterprises would be a less onerous method of remedying the problem of prior racial discrimination. The record presently before this Court establishes, however, that the section 8(a) program has not been an effective remedy. *See* Minorities and Women as Government Contractors, *supra,* at 35—62. And the record further demonstrates that programs designed to provide minority businesses with additional capital through loans or advances are incapable of making them full participants in our economy since construction contractors clearly perfer to deal with firms that have an established track record. *See* Transcript at 18, 51. Yet without mandated opportunities to participate in large scale construction contracts, minority businesses are not in a position to develop such credentials and, therefore, are not likely to garner a greater share of government contracts. As one of the witnesses at trial put it:

> It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if

> they don't have an established track record. They can not [*sic*] establish a track record if they don't get a chance to perform.

Transcript at 82. Expanding the set-aside to include all economically disadvantaged groups is also no answer to the problem, for in our present economy all construction firms are economically disadvantaged and redefining the set-aside to include them all would consequently be tantamount to striking it from the legislation entirely.

Plaintiffs make the further argument that any MBE requirement should be limited to a percentage "commensurate with the present minority participation in the economy." Plaintiffs' Post-Trial Memorandum at 15. The basis for this contention is apparently that the United States Commission of Civil Rights has only set the following goal for the federal government:

> Within the next 5 years, the Federal Government should increase the annual dollar volume of its contracts and subcontracts with minority males, minority females and nonminority, female-owned firms to an amount at least equal to their representation in all American businesses. Minorities and Women as Government Contractors, *supra,* at 129.

It is not clear whether plaintiffs would want the MBE requirement reduced to a tenth of its present scope to reflect more accurately the degree to which minority businesses actually participate in the United States economy or would be content merely to have it halved to approximate the percentage of minority enterprises that presently exist; nevertheless, the suggestion is absurd in either case.

In the first place, since the Act accounts for less than four percent of annual government contracting, the Commission's goal would not be met even if the MBE requirement were readjusted to require that 90 percent of all Act funds be spent through subcontracts with minority enterprises. Secondly, as Judge Snyder noted in *Constructors Association of Western Pennsylvania v. Kreps:*

> [T]he 10% figure is a reasonable one. Although the minority population is about 17%, the 10% figure is justifiably below that percentage, given their 1% past participation in the construction industry, and is not a concealed limitation on them. Since the program is short-term, there is no danger that the 10% requirement would become in practice a limitation of 10% once minority businesses have become established and competitive. On the other hand, the 10% requirement applies only to the extent local projects are funded by grants under [the Act] and is not overly intrusive on non-minorities. It is not a requirement that projects receiving federal funds assure that 10% of the *project* funds be given to minority businesses. Nor does it attempt to create an overall 10% requirement for the construction industry as a whole. These public works funds are intended to boost the construction industry by channeling extra funds into one aspect of the industry. A set-aside of 10% of these remedial funds for an additional remedial purpose is not unreasonable, especially given the availability of a waiver to the extent the 10% objective is unobtainable.

441 F.Supp. at 953.

Moreover, since the MBE requirement is subject to a December 31, 1978 cut-off date, Congress will have to

demonstrate continued compelling need in order for it to be extended beyond that time. Whether such need exists can then be determined through examination of readily available statistics, *id.*, at 953, including presumably updated Census Bureau data. *See* Survey of Minority-Owned Business Enterprises, *supra,* at 1.

Any reduction in the percentage of minority business participation required under the Act would, of course, result in reduced channeling of funds to the detriment of nonminority businesses and therefore less discriminatory impact. *See Ohio Contractors Association v. Economic Development Administration,* slip op. at 20. Nevertheless, the Court believes that requiring that 10 percent of all grant funds awarded under the Act be set aside for minority contractors or venders cannot be considered unreasonable in view of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises. The Court accordingly finds that the MBE requirement in its present form is necessary for the accomplishment of Congress' goal of promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry, and plaintiffs' first two causes of action are dismissed.

B. *The Statutory Question.*

Plaintiffs raise a further claim that the MBE requirement violates various provisions of the Civil Rights Act of 1866 and 1964.[18] The Court does not believe, however, that there is any inconsistency between the requirements imposed by virtue of the Civil Rights Acts and the course of conduct mandated by the MBE requirement. *See Constructors Association of Western Pennsylvania v. Kreps,* at 954. Indeed, it

18. 42 U.S.C. §§1981, 1983 and 1985 (1970); 42 U.S.C. §§2000d and 2000e *et seq.* (1970).

defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159, 173—74 (3d Cir.), *cert. denied,* 404 U.S. 854, 92 S. Ct. 98, 30 L.Ed.2d 95 (1971). Even more importantly, the host of cases permitting racially sensitive remedies for prior discriminatory acts totally belies plaintiffs' argument. *See, e. g., United Jewish Organizations v. Carey,* 430 U.S. 144, 161, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *Associated General Contractors of Massachusetts v. Altshuler,* 490 F.2d 9, 16—17 (1st Cir. 1973), *cert. denied,* 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (and cases cited therein). As the Court of Appeals for the Second Circuit has observed, racial classification is frequently impermissible not because it is a per se violation of the Constitution, but because it has been drawn for the purpose of maintaining racial inequality. Where, on the other hand, it is employed to effect equality, it is clearly proper. *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920, 931—32 (1968). It may well be that the Supreme Court's impending decision in the *Bakke* case[19] will necessitate some reevaluation of "reverse discrimination" actions such as this one, but it is not the role of this Court to follow the law as superior tribunals might delineate it at some time in the future. The Court therefore holds that the MBE requirement accords with the intent of the Civil Rights Acts and rejects plaintiffs' statutorily-based contentions.

19. *Bakke v. Regents of the University of California,* 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted,* 429 U.S. 1090, 97 S. Ct. 1098, 51 L. Ed.2d 535 (1977).

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

SUMMARY

In conclusion, the court holds that defendants have sustained their burden of establishing the constitutionality of the MBE requirement. Plaintiffs' request for a preliminary injunction and declaratory relief is denied, the Secretary of Commerce's motion for a directed verdict is granted and the complaint is dismissed in its entirety.

SO ORDERED.

Dated: New York, New York
December 19, 1977

U.S.D.J.

JUDGMENT DATED DECEMBER 28, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. EARL FULLILOVE, et al.,

Plaintiffs

-against-

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Defendants.

77 Civ. 5786 (HFW)

Plaintiffs having moved by show cause order and the Court having denied plaintiffs' request for a temporary restraining order, and the Court, pursuant to Rule 65(a)(2), of the Federal Rules of Civil Procedure, set the matter down for a consolidated hearing on the application for a preliminary injunction and trial on the merits, and the proceeding took place on November 31 and December 2, 1977, before the Honorable Henry F. Werker, United States District Judge, and the Court thereafter on December 21, 1977, having handed down its memorandum opinion, denying plaintiffs' request for a preliminary injunction and declaratory relief and granting the Secretary's motion for a directed verdict and dismissing the complaint, it is,

ORDERED, ADJUDGED and DECREED: That defendants JUANITA KREPS, Secretary of Commerce of the United States of America, et al., have judgment against plaintiffs H. EARL FULLILOVE, et al., dismissing the complaint in its entirety.

Dated: New York, N.Y.
December 28, 1977

s/ Raymond F. Burghardt
Clerk

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 22, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 894—September Term, 1977.

(Argued May 24, 1978 Decided September 22, 1978.)

Docket No. 78-6011

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs-Appellants,

—v.—

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITALS CORPORATION,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge,* and
BLUMENFELD* and MEHRTENS,** *District Judges.*

* Senior United States District Judge for the District of Connecticut, sitting by designation.

** Senior United States District Judge for the Southern District of Florida, sitting by designation.

Opinion of the Court of Appeals for the Second Circuit Dated September 22, 1978

This is an appeal from an order of the United States District Court for the Southern District of New York, Werker, *J.*, denying plaintiffs' application for a preliminary injunction restraining the defendants from implementing a federal statute requiring that 10 percent of all federal funds appropriated for specified public works projects be expended on bids tendered by minority business enterprises, and dismissing the action.

Affirmed.

ROBERT G. BENISCH (Berman, Paley, Goldstein & Berman, New York, N.Y.); Robert J. Fink, of counsel (French, Fink, Markle & McCallion, New York, N.Y.); Richard L. O'Hara, Robert A. Kennedy, Robert J. Aurigema, William M. Savino, Stephen J. Smirti, Jr., of counsel (Doran, Colleran, O'Hara & Dunne, Garden City, N.Y.), on the brief, *for Plaintiffs-Appellants.*

ROBERT B. FISKE, JR., United States Attorney, New York, N.Y. (Gaines Gwathmey, III, Dennison Young, Jr., Mary C. Daly, Patrick H. Barth, Assistant United States Attorneys, of counsel); Drew S. Days, III, Assistant Attorney General, Civil Rights Div., U.S. Dept. of Justice (Vincent F. O'Rourke, Jr., Jessica Dunsay Silver, of counsel), *for Defendant-Appellee Kreps.*

DOMINICK J. TUMINARO, Assistant Attorney General of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Attorney General, George D. Zuckerman, Assistant Attorney

General in charge of Civil Rights Bureau; Arnold D. Fleischer, Assistant Attorney General, of counsel), *for Defendant-Appellee State of New York.*

BLUMENFELD, *District Judge:*

This is an appeal from the decision of the District Court, Werker, *J.*, that upheld the constitutionality of section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. § 6705(f)(2). The statute mandates that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." "Minority business enterprise" (MBE) is defined as "a business at least 50 per centum of which is owned by minority group members . . . ." The statute defines minority group members in racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

Appellants are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. Their application for a preliminary injunction on their petition for declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the MBE provision was consolidated with a hearing on the merits. The District Court found that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry. The District Court denied their petition and dismissed the complaint. We affirm.

I.

In 1976 Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369 (July 22, 1976), 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735, designed to help alleviate nationwide unemployment in the economically depressed construction industry by appropriating $2 billion for public works projects. The Secretary of Commerce was to administer the program through the Economic Development Administration (EDA), charged with distributing funds under the Act to state and local governments. Congress mandated that the program be administered expeditiously[1] and the Secretary approved grants for the entire appropriation by February 1977. In May 1977, Congress supplemented the initial appropriation through the Public Works Employment Act of 1977, Pub. L. No. 95-28 (May 13, 1977), 91 Stat. 116-121, 42 U.S.C. §§ 6701-6736, to the extent of an additional $4 billion.

During the consideration of the PWEA on the floor of the House, the MBE requirement was introduced as an amendment to the Act. As contained in the final enactment, the provision reads:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For

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1 The Act required that each eligible project be started within 90 days of EDA approval (42 U.S.C. § 6705(d)), any application that was not rejected within 60 days of its submission to EDA would be deemed approved (42 U.S.C. § 6706), and the EDA was ordered to promulgate regulations governing grant applications within 30 days of the Act's passage (42 U.S.C. § 6706). The Act became law on May 24, 1977 and funds allocated under the PWEA had to be committed to an approved state or local project by September 30, 1977.

> purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The appellants' attack is aimed only at the amendment; they do not contend that the inclusion of the amendment rendered the entire statute unconstitutional.

The question presented in this appeal is a narrow one. We are called upon to decide whether Congress acted in a constitutionally permissible manner in conditioning the receipt of federal grants for local public works projects under the PWEA upon the requirement that 10 percent of the grants be allocated to minority business enterprises.

II.

At the outset we note that when Congress seeks to exercise its spending power, it is required to distribute federal funds in a manner that neither violates the equal protection rights of any group nor continues the effects of violations that have occurred in the past, for

> "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

Lau v. *Nichols*, 414 U.S. 563, 569 (1974), *quoting* 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

The Secretary acknowledges that in enacting the MBE provision Congress created an explicitly race-based condition on the receipt of PWEA funds. Under modern equal protection standards,[2] racial classifications are "suspect." This denomination often triggers the highest level of scrutiny imposed by the courts. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Usually when a classification turns upon an individual's racial or ethnic background, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4904 (U.S. June 28, 1978) (opinion of Powell, J.); *In re Griffiths*, 413 U.S. 717 (1973). Whether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race is a question we need not reach, for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster.[3]

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2 Although the Equal Protection Clause appears only in the fourteenth amendment, which applies only to the states, the Supreme Court has held that the equal protection principles of the fourteenth amendment are embodied in the Due Process Clause of the fifth amendment. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 99-100 (1976); Washington v. Davis, 426 U.S. 229, 239 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

3 Four Justices of the Supreme Court have indicated that an intermediate standard of scrutiny is sufficient when Government "acts not to demean or to insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area." *Bakke*, *supra*, 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Blackmun, JJ.) and *see id.* at 4920-21. Mr. Justice Powell, however, rejected that view and the other four Justices did not reach the question.

III.

The principles which the court below applied in rejecting the appellants' contentions that the amendment was either unconstitutional or in violation of the Civil Rights Act of 1964 are not in dispute on this appeal. However, we restate them briefly in order to put the appellants' argument that they were misapplied by the trial judge into sharper focus.

The appellants agree that the district judge correctly decided that "strict scrutiny" was required, but they contend that the standard of review which such scrutiny requires was not correctly applied. Having conceded below and properly so, that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," they advance two separate arguments that a compelling interest was not shown.

Their argument is that there was not an adequate basis for the court below to conclude that Congress' purpose was to remedy prior wrongs to minority groups who had been denied opportunities in the construction industry as a result of race discrimination. This proposition has two elements that are analytically distinct. That they are treated in combination is understandable for they are bound together and rest to some extent on the same history and policy considerations. The amendment is permissible only if it is a remedy for past discrimination. *See Regents of the University of California* v. *Bakke, supra,* 46 U.S.L.W. at 4905 (opinion of Powell, J.). Whether it was Congress' *purpose* to enact a remedy for past discrimination is one question. Whether such discrimination occurred in the past is another question. The second question depends upon an assessment of historical facts, the first upon what was in the mind of Congress.

A. *Congress' Purpose*

Congressional purpose is relevant to consideration of whether the classification is permissible. Under any equal protection test "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).[4] More recently in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973), the Court said that even if strict judicial scrutiny was not required, the statute "must still be examined to determine whether it rationally furthers some legitimate, articulated[5] state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *See also* L. Tribe, *American Constitutional Law* § 16-30 at 1083-85 (1978); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 20-22 (1972). Since strict scrutiny should require no less, we turn our attention to whether Congress articulated its purpose in enacting the amendment.

The rule for ascertaining what the purpose of Congress was in enacting a statute that is subject to scrutiny under

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4 The notion that any conceivable purpose which would uphold a classification should be attributed to it, *e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), allows for more judicial restraint than strict scrutiny permits. In *McGowan* the Court stated that the Equal Protection Clause is violated only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective—a statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it.

5 Since no content was given to the word "articulated," we view it as a prophylactic against resort to the "any conceivable reason" justification of *McGowan*. See note 4 *supra*.

the Equal Protection Clause is more deferential than the rule which would be applied to test a state statute. In differentiating a law passed by Congress from a mandate by a state legislature, or an administrative agency, the Court has said, "Alternatively if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 103 (1976). That a large measure of judicial restraint must be accorded to Congress in its enactment of legislation to remedy past discrimination was affirmed recently in *Regents of the University of California* v. *Bakke, supra,* 46 U.S.L.W. at 4905 n.41 (opinion of Powell, J.):

> "[W]e are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer,* 392 U.S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."

Judge Werker did not base his decision that it was the purpose of Congress to remedy past discrimination solely on a presumption. There is no need to rely solely on a bare presumption to determine the purpose of Congress. The classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors.[6] It has been

6 The appellants argue that the legislative history is silent with respect to any purpose to remedy the effect of past discrimination, and shows only that $4 billion which Congress allocated under the PWEA was expected to generate 300,000 jobs in other industries. But, by that particular amendment (§ 103(f)(2)), injected in the Act from the floor during the course of the debate, Congress did not create more jobs. It is clear from the amendment that Congress intended to guarantee that part of the jobs already contemplated by the PWEA would go to minority businesses, and not, as the plaintiffs contend, to "disadvantaged as opposed to minority small businesses."

suggested that "[i]f an objective can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary." Note, *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1077 (1969). It is also beyond dispute that the set-aside was intended to remedy past discrimination. To support that conclusion, it is "enough that [the court] perceive a basis upon which Congress might predicate a judgment that" the MBE amendment would remedy past discrimination against minority construction businesses. *See Katzenbach* v. *Morgan, supra,* 384 U.S. at 656. In view of the comprehensive legislation which Congress has enacted during the past decade and a half for the benefit of those minorities who have been victims of past discrimination,[7] any purpose Congress might have had

7 For example, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6); Pub. L. No. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17); Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. §§ 2000e, 2000e-6, 2000e-9); Pub. L. No. 93-608, § 3(1), 88 Stat. 1972 (codified at 42 U.S.C. § 2000e-4); Pub. L. No. 94-273, § 3(24), 90 Stat. 377 (codified at 42 U.S.C. § 2000e-14); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Pub. L. No. 90-284, title I, § 103(c), 82 Stat. 75; Pub. L. No. 91-285, §§ 3-6, 84 Stat. 315; Pub. L. No. 91-405, title II, § 204(e), 84 Stat. 853; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, title II, §§ 204, 206, title IX, § 405, 89 Stat. 402, 404 (codified at 42 U.S.C. § 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified at 18 U.S.C. §§ 231-233, 241, 242, 245, 1153, 2101, 2102; 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-

other than to remedy the effects of past discrimination is difficult to imagine.

B. *Past Discrimination*

Although Congress' purpose and the factual background from which it sprang are not so disjoined that they could not be considered together, Judge Werker considered the question of past discrimination separately. The comprehensive opinion of the District Judge to which we make reference considered remarks made on the floor of the House when the MBE provision was introduced during the debate on the PWEA. He noted that Representative Mitchell, the amendment's sponsor, criticized the federal program of assistance to minority businesses that permits them to become "viable entities in our system" only to be "cut off" when government contracts are awarded. See Joint App. 160a; 123 Cong. Rec. H. 1437 (daily ed. Feb. 24, 1977), *reprinted in Associated General Contractors* v. *Secretary of Commerce,* 441 F. Supp. 955, 997-1006 (C.D. Cal. 1977) (Appendix C). In concluding that Congress found past discrimination, he also properly relied upon remarks made by Representative John Conyers of New York. Speaking in favor of the amendment, the Representative observed that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time.*" *Id.* (emphasis added). Those remarks clearly disclosed the connection between the past discrimination and the "set-aside" amendment, and powerfully reinforced the conclusion reached by the judge.[8]

1326, 1331, 1341; 28 U.S.C. § 1360 nts.; 42 U.S.C. §§ 1973j; 3533, 3535, 3601-3619, 3631); Pub. L. No. 93-265, 88 Stat. 84 (codified at 25 U.S.C. § 1341).

8 Statements made in debates may be regarded as authoritative indicia of congressional intent. Pan American World Airways, Inc. v. CAB,

That an explicit finding of past discrimination was not included in the committee reports may sometimes be "troublesome." *Constructors Association* v. *Kreps,* 441 F. Supp. 936, 952 (W.D. Pa. 1977), *aff'd,* 573 F.2d 811 (3d Cir. 1978).[9] In this case it is not surprising in view of the manner in which the amendment was introduced.[10] But the absence of such a finding in the reports is not determinative. The record that was considered provided sufficient justification for a finding of past discrimination. *Cf. Arizona* v. *Washington,* 46 U.S.L.W. 4127, 4132 (U.S. Feb. 26, 1978) (when record provides sufficient justification for trial judge's mistrial ruling, ruling not subject to collateral attack simply because judge failed to make explicit finding of "manifest necessity" for mistrial). The record may be sparse, but it is not entirely silent.

The judge quite properly took account of the data and observations contained in a report prepared by the Department of Commerce to evaluate existing opportunities for minority business. See U.S. Dept. of Commerce, Office of

380 F.2d 770, 782 (2d Cir. 1967). The situation here was similar to that in United States v. Oates, 560 F.2d 45, 72 (2d Cir. 1977), where the court said: "It is, of course of critical importance that it was with the explanations of [the Representative who sponsored the amendment] freshly in mind that the full House of Representatives on the very day these remarks were uttered finally approved" the bill. The MBE amendment was considered and passed by the House on February 24, 1977, the date these statements were made on the floor. H.R. Rep. No. 95-20, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 150. The remarks were much more extensive but were all to the same effect.

9 Judge Snyder in Constructors Ass'n v. Kreps, *supra*, found the same passage sufficient evidence that Congress enacted the MBE provision to remedy past discrimination in the construction industry.

10 This explains the absence of any mention of the amendment in the Committee reports. Furthermore, the lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry.

Minority Business Enterprise, *Minority Business Opportunity Handbook* (August 1976). Noting plaintiffs' objection to the soundness of the data contained in the report, the Judge found "even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to conclude that 'the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical *exclusion* from the mainstream economy.'" Joint App. 161a quoting from the *Minority Handbook* at 1-1-2 (court's emphasis included).

Moreover the judge undertook consideration of evidence that Congress had recorded elsewhere to support its finding that the history of discrimination was specific to the construction industry. A report prepared by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise contains the following statement:

> "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular*. However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them."

Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, at 182-83 (November 1976) (emphasis added). The judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record and establishes a "perceived" basis for congressional action.

IV.

In employment discrimination cases it is well established that the government's interest in overcoming the disadvantages resulting from past discrimination in employment on account of race is sufficiently compelling to justify a remedy which requires the use of racial preferences.[11] The vitality of the rationale in those cases has not disturbed by the recent decision of the Court in *Regents of the University of California* v. *Bakke, supra.* The Justices did not disagree with the principle that race-conscious remedies can be imposed when there have been judicial, legislative or administrative findings of past discrimination and the remedies fashioned are appropriately drawn to rectify that

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11 Many of those cases are cited by Chief Judge Coffin in support of a decision upholding that principle in Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16-17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), along with Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 954 (1971), which is cited with approval in *Bakke*, 46 U.S.L.W. at 4905.

Section 6705(f)(2) merely broadens the economic area in which that principle applies to include independent contractors in the construction industry. We do not attempt to draw any distinction between services and materials which might be furnished by independent subcontractors on construction jobs. We note, however, that a person conducting a minority business who is denied an opportunity to compete for a certain amount of business on account of his race would have a cause of action under 42 U.S.C. § 1981. Runyon v. McCrary, 427 U.S. 160 (1976); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496, 499-500 (D. Conn. 1978).

discrimination. *Id.*, 46 U.S.L.W. at 4905 & n.41 (opinion of Powell, J.).[12]

In affirmative action programs to remedy the effects of past discrimination the effect of preferring members of the injured groups at the expense of others must be considered. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), Mr. Justice Powell, at 784-86 (concurring & dissenting), warned that affirmative action ordered as equitable relief must not exceed the bounds of fundamental fairness. *See Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976). It is established that in fashioning remedies for past discrimination courts must be sensitive to interests which may be adversely affected by the remedy. The courts, here, as in a number of other areas where legislation for which there is a compelling interest collides with constitutional principles, have adopted an ad hoc balancing test which examines each particular case, *e.g.*, *Branzburg* v. *Hayes*,

12 As Mr. Justice Powell noted:

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* [v. *Carey*, 430 U.S. 144, 155-156 (1977)]; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1960). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

Regents of the Univ. of Cal. v. Bakke, *supra*, 46 U.S.L.W. at 4906-07 (footnote omitted).

408 U.S. 665 (1972) (public interest in law enforcement outweighs reporters' first and fourteenth amendment interest in keeping news sources confidential). One of the significant limitations on a remedy of "reverse discrimination" for past discrimination is that its effects shall "not be 'identifiable,' that is to say, concentrated upon a small ascertainable group of non-minority persons." *EEOC* v. *Local 638 . . . Local 28, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976). *See also Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). The amendment at issue falls well within such a boundary against inequitable results. The PWEA which added $4 billion to the $200 million not yet expended portion of the amount authorized by Round I (Local Public Works Act) amounted to about 2.5 percent of the total of nearly $170 billion spent on construction in the United States for 1977, according to Department of Commerce statistics.[13] The set-aside for minority contractors under the PWEA was for 10 percent of the total grant and thus extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of these appellants, who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry.[14]

13 U.S. Dept. of Commerce, Industry and Trade Administration, *Construction Review*, May-June 1978, at 11.

14 U.S. Bureau of the Census, *1972 Census of Construction Industries: Industries Series, United States Summary—Statistics for Construction*

Considering that nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

Ours is not the only circuit in which the MBE amendment's constitutionality has been challenged by associations of general contractors. Other cases that have denied preliminary injunctions against enforcement of the "set-aside" provision are *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, No. 77-0676 (D.R.I. Feb. 6, 1978); *Associated General Contractors* v. *Secretary of Commerce*, No. 77-4218 (D. Kan. Dec. 19, 1977); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (D.S.C. 1977); *Ohio Contractors Association* v. *Economic Development Administration*, No. C-1-77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association* v. *Kreps*, 439 F. Supp. 1331 (D. Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce*, No. 77-8351 (S.D. Fla. Nov. 3, 1977). *But see Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded*, 46 U.S.L.W. 3802 (U.S. July 3, 1978), which held the provision invalid.[15] That case reached

Establishments With and Without Payrolls, Table A 1 (Aug. 1975); U.S. Bureau of the Census, *1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses*, Table 1 (May 1975).

15 In Associated Gen. Contractors v. Secretary of Commerce, *supra*, the court held that § 103(f)(2) of the PWEA is inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1. The trouble with that conclusion is that it is based on the overbroad premise that *any* reverse discrimination in a remedy for past discrimination is prohibited *per se* by Title VI. A majority of the Supreme Court has held that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." Regents of the Univ. of Cal. v. Bakke, *supra*, 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *id.* at 4901 (opinion of Powell, J.). As we have shown above, a remedy for the effects of past discrimination which results in a not unreasonable amount of reverse discrimination is not unconstitutional. *See, e.g.*, Franks v. Bowman Transportation Co., *supra*. *See also* Acha v. Beame, *supra*; United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). The effect here is minimal when compared with Rios v. Enterprise Ass'n Steamfitters Local Union 638, 501 F.2d 622 (2d Cir. 1974), which upheld an order to a union to admit minority applicants to an apprenticeship program in sufficient numbers to achieve a goal of 30 percent nonwhite membership.

the Supreme Court where it was remanded to the District Court for consideration of mootness. *See also Wright Farms Construction, Inc.* v. *Kreps*, No. 77-260 (D. Vt. Dec. 23, 1977).[16]

16 In Wright Farms Constr., Inc. v. Kreps, *supra*, the court made a specific finding that Vermont had a small minority population, and therefore held the MBE provision unconstitutional as applied to contractors in that state. However, Congress clearly manifested its intent that the set-aside provision should not apply in such a case. See 123 Cong. Rec. 1437 (daily ed. Feb. 24, 1977), *reprinted* in Associated Gen. Contractors v. Secretary of Commerce, *supra*, 441 F. Supp. at 998-99 (Appendix C), where Representative Mitchell, the sponsor of the amendment, engaged in the following colloquy with Representative Kazen:

"Mr. Kazen: All right. What happens in the rural areas where there are no minority enterprises? Will the 10 percent be held up in order to bring minority enterprises from somewhere else where there is no unemployment into a place where there is unemployment and there is no minority enterprise?

"Mr. Mitchell of Maryland: In response to the gentleman's question, the answer is 'No.'

" . . .

" . . . Let me tell the gentleman why that would not occur. When Presidents Nixon and Ford put out their Executive orders to all the agencies to utilize minority contractors, the agencies then established certain guidelines which said, all right, we will utilize these minority contractors wherever possible, but where there are none, there can be no utilization, and therefore no project should be delayed.

"For example, I would not expect to take my minority contractors from Maryland into Idaho to meet that State's requirement. That will not be an issue.

"Mr. Kazen: If the gentleman would yield further, this is what I wanted the gentleman to clarify, that where there are no minority

Both the Third and the Sixth Circuits have upheld the constitutionality of the MBE amendment. *Constructors Association* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, —— F.2d ——, No. 78-3053 (6th Cir. July 7, 1978). We agree with their decisions that section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), is not unconstitutional.

The judgment is affirmed.

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enterprise contractors [then] this provision would not be in effect; am I correct?

"Mr. Mitchell of Maryland: That is absolutely correct, and that is done by administrative action already on the books with all of the agencies.

"Mr. Kazen: Does the gentleman's amendment leave room for that type of discretion in the Secretary?

"Mr. Mitchell of Maryland: I assume that it does. It would be my intent that it would because that is existing administrative law."

As Representative Mitchell amplified further, 123 Cong. Rec. 1438, *reprinted in* 441 F. Supp. at 1000:

" . . . I reiterate what I said earlier, that we already have in existence within the agency structure the SOP administrative law that says this kind of amendment would not apply where there are no minority contractors or where there are no minorities. It is already in the law."

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case filed by H. Earl Fullilove, *et al.* It is submitted pursuant to the written consent of the parties.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade associations. The principal goal of EEAC is to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). In addition, those EEAC members, or their constituents, who are federal contractors are required to comply with Presidential Executive Order Number 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978)) ("E. O. 11246") and supporting regulations, which, in part, contain extensive affirmative action requirements. Many of these same members, as federal contractors, also are required to comply with federal minority business subcontracting programs and their affirmative action

and minority subcontracting requirements. Consequently, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, which involve the legality of the minority business set-aside provision in the Public Works Employment Act of 1977 requiring that at least ten percent of all federal funds appropriated for specified public works projects be expended on bids tendered by minority business enterprises.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment remedial issues. See, *e.g.*, *The Regents of the University of California* v. *Allan Bakke*, 98 Sup. Ct. 2733 (1978); *County of Los Angeles* v. *Davis* (No. 77-1553), *petition for cert. granted; Furnco Construction Corporation* v. *Waters*, 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); and *Kaiser Aluminum & Chemical Corporation* v. *Weber* (No. 78-435), *petition for cert. granted.*

STATEMENT OF THE CASE

Petitioners are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. They sought declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the minority business set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2). That section mandates that "no grant

shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." A minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members. . . ." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The district court denied their petition and dismissed the complaint, holding that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry.

The Court of Appeals for the Second Circuit affirmed the judgment of the district court, finding that "even under the most exacting standard of review the [minority business set-aside] provision passes constitutional muster."

REASONS FOR GRANTING A WRIT

I. THE SECOND CIRCUIT'S HOLDING THAT THE MINIMUM TEN PERCENT MINORITY BUSINESS SET-ASIDE AMENDMENT TO THE PUBLIC WORKS EMPLOYMENT ACT IS NOT UNCONSTITUTIONAL IS CONTRARY TO THE DECISIONS OF SEVERAL OTHER COURTS, AND HAS CONTRIBUTED TO UNCERTAINTY AND CONFUSION IN THE ACT'S IMPLEMENTATION NATIONWIDE.

A. The Split in Judicial Opinion

As the Second Circuit acknowledged, the constitutionality of the minimum 10 percent minority business set-aside amendment has been challenged in federal district courts nationwide. (Slip op. at 16-17 and cases cited therein). In several of those cases, preliminary injunctions against its enforcement were denied,[1] and in others the amendment was upheld.[2] In still other cases, however, the amendment has been

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[1] *See, e.g., Virginia Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978); *Michigan Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, —— F. Supp. ——, No. C.A. M-77-165 (W.D. Mich., Jan. 4, 1978); *Carolinas Branch, Associated General Contractors, Inc.* v. *Kreps*, 442 F. Supp. 392 (D. S.C. 1977); *Florida East Coast Chapter of the Associated General Contractors of America, Inc.* v. *Secretary of Commerce*, —— F. Supp. ——, No. C.A. 77-8351 (S.D. Fla., Nov. 3, 1977).

[2] See *Rhode Island Chapter, Associated General Contractors of America* v. *Kreps*, 446 F. Supp. 553 (D. R.I. 1978); *Associated General Contractors of Kansas* v. *Secretary of Commerce*, —— F. Supp. ——, No. C.A. 77-4218 (D. Kan., Feb. 10, 1978); *Fullilove* v. *Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977) (the district court decision below).

declared unconstitutional, and public officials have been enjoined from requiring compliance with its provisions.[3]

The decision of the Second Circuit represents the first appellate decision explicity upholding the program's constitutionality.[4] The decision, which is contrary to a previous district court decision in its own circuit,[5] has not discouraged district courts located in other circuits from disagreeing with the holding of the Second Circuit. Indeed, district courts in both California and Montana struck down the subject amendment as unconstitutional *after* the Second Circuit's decision upholding its constitutionality.[6]

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[3] *Associated General Contractors of Calif., et al.* v. *Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), judgment vacated and remanded, 46 U.S.L.W. 3892 (U.S. July 3, 1978); original judgment reinstated in full (C.D. Cal., Oct. 20, 1978); *Montana Contractors Association* v. *Kreps*, —— F. Supp. ——, No. CV 77-62-M (D. Mont., 1978). *See also Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977) (amendment unconstitutional as applied).

[4] In its opinion, the Second Circuit declared its agreement with Third and Sixth Circuit decisions that "have upheld the constitutionality of the MBE amendment." (Slip op. at 17). See *Ohio Contractors Association* v. *Economic Development Administration*, 580 F.2d 213 (6th Cir. 1978); *Construction Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978). In both of those cases, however, the circuit courts held only that the district courts had not abused their discretion in declining to issue a preliminary injunction.

[5] *Wright Farm Construction* v. *Kreps, supra* note 3.

[6] *Associated General Contractors of Calif., et al.* v. *Secretary of Commerce, supra*, note 3; *Montana Contractors Association* v. *Kreps, supra* note 3.

The impact of this split among the lower courts has caused great difficulty for private government contractors in attempting to conform to the requirements of the minority business amendment. Also, government officials have defended the amendment inconsistently. This perhaps is best illustrated by the fact that in some cases, such as *Associated General Contractors of Calif., et al.* v. *Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), *judgment vacated and remanded*, 46 U.S.L.W. 3892 (U.S. July 3, 1978); *original judgment reinstated in full* (C.D. Cal., Oct. 20, 1978), the defendant officials argued that the case was moot because the appropriation already had been expended, while in other cases, such as the one here, the defendant officials did not contest the case on the grounds of mootness, and the issue was not discussed by the court.[7]

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[7] Judge Hauk noted in his decision after remand in *AGC of California, supra*, that three courts of appeals, including the Second Circuit in this case, determined the constitutionality of the minority business participation provision without any suggestion that the issue was moot. (Slip op. at 26). Judge Hauk also pointed out that in none of these cases did any of the defendants, including the federal defendant in the California case, make any argument that the cases were moot. (*Id.*, at 27). Indeed, he pointed to a statement by a Justice Department official that the Department's strategy in defending the various actions brought under the Act in question was simply "to stall litigation for as long as possible in order to keep the funds flowing." (*Id.*, at n.19).

It should be noted that the minimum 10 percent minority business participation provision was part of a set of amendments (popularly refered to as "Round II") to the Local Public Works Capital Development and Investment Act of

In any event, because the validity of the amendment, and of the program it incorporates, will remain open to frequent and recurring question, the clarification and administration of what Congress deemed an important national program is hampered. What clearly was meant to be a part of a national effort to boost employment levels in the construction industry [8] now is subject to selective implementation, depending upon the district in which a particular project is located.

Moreover, unless they are resolved, the problems created by the selective enforcement of the minority business participation amendment promise to grow more troublesome under other, more extensive, federal contracting programs that incorporate ethnic and racially related eligibility criteria. The issue of whether such programs are constitutional is clearly presented in the instant case. The decision below presents this Court with an opportunity to establish controlling principles in this area. Unless the issues are resolved at this time, it is likely that confusion and uncertainty will result from constant lower court litigation.

1976, Pub. L. No. 94-369, 90 Stat. 999-1012, codified at 42 U.S.C. § 6701 *et seq.*, amended by Pub. L. No. 95-28, 91 Stat. 116-121. When a "Round III" was proposed in 1978, the Carter Administration argued against it, apparently on the basis that the moneys appropriated under Round II still were being spent, and that its impact upon the nation's economy would continue through 1980. See Daily Labor Rep. No. 204, at A-3 (Oct. 20, 1978).

[8] S. Rep. No. 38, 95th Cong., 1st Sess. 1-2 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 150.

As we previously have indicated to the Court, confusion among court decisions and agency policies regarding the permissible legal limits of employment affirmative action has greatly hampered the effective administration of the employment related civil rights acts. Of particular concern is the negative impact this confusion has had upon voluntary compliance with those laws. See EEAC's brief supporting the petitions for certiorari in *Kaiser Aluminum & Chemical Corporation* v. *Brian F. Weber* and related cases (Nos. 78-432, 78-435, and 78-436). Unless issues such as those raised in the instant case are resolved by the Court, similar problems undoubtedly also will jeopardize the minority business programs.

B. The numerous judicial challenges to the minority business set-aside provision mirror similar constitutional issues concerning the legality of a wide array of other current minority business set-aside programs, many of which also could be subject to extensive and prolonged litigation.

The minority business set-aside amendment to the Public Works Employment Act is only one among many federal minority business assistant programs, some of which impact upon the entire range of federal government contracting. Whether promulgated by executive order and regulations, or enacted by statute, these programs utilize predominantly racially-based criteria in the awarding of a certain percentage of government contracts, and thus raise important constitutional questions similar to those raised here.[9]

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[9] For a brief summary of significant federal minority business assistance and subcontracting programs, see Appendix, *infra*.

Under Executive Order 11625, 36 Fed. Reg. 19967 (1969), for example, government agencies have promulgated a variety of regulations to promote minority business contracting opportunities. Although the Executive Order does not authorize set-asides, a temporary rule has been promulgated by one agency requiring federal contractors to establish percentage goals for minority business participation, with an initial percentage goal of 20% to be set in most cases. See Temporary Rule of the Department of the Interior, 43 Fed. Reg. 41207 (Sept. 15, 1978). The setting of percentage goals is justified by the Interior Department on the ground that minority businesses have been underrepresented historically in Interior procurement. No findings of past discrimination are set forth.

The uncertainty that exists as to the authority of executive departments to require such percentage goals also is present in the several Congressional enactments that authorize set-asides similar to the one presented here. For example, in accordance with directives under Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (90 Stat. 31), the Federal Railroad Administration requires recipients of federal monies under the Act to establish goals and timetables for minority business utilization. 49 C.F.R. § 265.5(j) (1977).

The most comprehensive legislation providing for minority business contracting set-asides is found in recent legislation amending the Small Business Act. Under this legislation (Pub. L. No. 95-507, 92 Stat. 1757, 15 U.S.C. §§ 683 *et seq.* (1978)), companies

receiving federal contracts exceeding one million dollars for construction and $500,000 for other purposes are required to develop and have approved a minority business subcontracting plan. The subcontracting plan must include, among other things, percentage goals for the utilization by contractors of small businesses generally and those owned and controlled by "socially and economically disadvantaged individuals." In the latter case, the contractor is to presume that Black, Hispanic and Native Americans, "other minorities," or individuals found to be disadvantaged under Section 8(a) of the Small Business Act are socially and economically disadvantaged. The legislation further provides that each procuring agency establish an Office of Small and Disadvantaged Business Utilization to consult with the Small Business Administration in developing "realistic goals" for small and disadvantaged business participation in federal contracts.

This legislation thus introduces into major contracts under the procurement system a minority business set-aside strikingly similar to the one at issue here, and insures a continuing need to clarify the extent to which the government may distribute a portion of federal contract monies to companies on the basis of the racial and ethnic profiles of its owners and operators. Additionally, as noted below, this legislative scheme is accompanied by a legislative history which, like the Public Works Employment Act, raises serious questions about the necessity for legislative findings of discrimination as a *sine qua non* for government sanctioned racial preferences.

C. The split among courts over the constitutionality of the minority business set-aside amendment raises critical questions, unresolved in *Bakke*, about the degree to which a governmental body must articulate findings of discrimination in order to establish lawfully racial and ethnic set-asides.

In its analysis of this Court's opinions in *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733 (1978), the Second Circuit identified two "analytically distinct" questions, both of which would have to be answered affirmatively in order to determine that the set-aside amendment was constitutional: (1) Was it the purpose of Congress to enact a remedy for past discrimination? and (2) Has discrimination in the past occurred? (Slip Op. at 7-8). The Second Circuit recognized that its conclusion that the set-aside was intended to remedy past discrimination was not based on statements made to that effect during legislative consideration of the amendment. Rather, the court "perceived", primarily from the statutory language itself, that any other purpose for the amendment would be "difficult to imagine." (*Id.*, at 10-11).

Other courts have disagreed with the Second Circuit's analysis, not because other purposes for the enacted amendment *may have existed*, but on the grounds that the reasons articulated by Congress for the amendment could not withstand the strict judicial scrutiny such racial classifications require. For example, the court in *AGC of California* v. *Secretary of Commerce*, *supra*, found that means of promoting employment of minority group contractors existed that were less intrusive than the "10% racial quota" and thus, as in *Bakke*, the amendment was not a

"necessary" means to promote a legitimate, substantial interest. (Slip Op. at 28).

The district court in *Montana Contractors' Association* v. *Secretary of Commerce*, *supra*, evaluated the amendment in terms of the legislative, administrative or judicial findings which this Court in *Bakke* declared were necessary to justify government sanctioned racial and ethnic distinctions. The court held that any Congressional findings made were, at best, inadequate because of a failure to identify the victims of past discrimination in the letting of government contracts. Unpersuaded that legislative findings as to unequal participation among nonminority and minority contractors are legally sufficient, the district court opined that *Bakke* "forbids the use of a [sic] general societal discrimination to justify a scheme which seeks to insure that in any given facet of public life the percentages of races are proportionate." (Slip op. at 6).[10]

Unlike these courts, the Second Circuit here interpreted the need to develop findings, and have such findings articulated on the record far more leniently. While admitting that explicit findings of past discrimination do not appear in the committee reports, the Second Circuit found the record "not entirely silent" and held that the lower court's finding of past

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[10] Similarly, in a district court case within the Second Circuit decided previous to the Second Circuit's decision here, the court found that the minority business set-aside amendment had been imposed within its jurisdiction "without the necessary finding that there existed prior discrimination that needed to be remedied." *Wright Farm Construction* v. *Kreps*, *supra*, note 3 at 25.

discrimination properly was established from three other sources: (1) statements by the amendment's sponsor and a supporter to the effect that minority businesses are excluded from contract awards; (2) an unrelated report on minority business opportunities by the Commerce Department concerning the "historical exclusion" of minority entrepreneurs from the mainstream economy; and (3) an unrelated report concerning the preclusion of minority businesses, particularly in the construction industry, prepared by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise. (Slip op. at 11-14).

The Second Circuit's opinion, when compared with the other court decisions reviewed above places in stark relief the question of whether Congress validly exercised its "special competence to make findings with respect to the effects of identified past discrimination" and whether the amendment constitutes an appropriate remedial measure within its discretionary authority. *Regents of the University of California* v. *Bakke*, *supra* at 1015 n.41 (Powell, J.). In *Bakke*, Justice Powell specifically sanctioned only legislation, such as Section 5 of the Voting Rights Act of 1965, which gave detailed consideration of past discriminatory acts and charged particular administrative bodies with monitoring similar future violations and formulating appropriate remedies. 98 S. Ct. 2733, 2755, n.41. Justice Brennan, on the other hand, gave specific approval to the minority business set-aside amendment here challenged, finding within it a congressional judgment that the remedial use of race is permissible. "The legislative history of this race conscious legislation", Justice Brennan

stated, "reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises." *Id.* at 2778-79. That any purported conflict between Title VI of the Civil Rights Act of 1964 and the amendment was not raised during consideration of the new legislation reflects, according to Justice Brennan, a valid congressional judgment that the remedial use of race is permissible under Title VI. *Id.*

Without expressing an opinion on the legality of the amendment, EEAC submits that this issue raises critical questions about the equal protection guarantees inherent in the Due Process Clause of the Fifth Amendment and Congressional enactments which may impact upon it—questions which need to be addressed by this Court. The equal protection issue, which has been raised before in the context of another minority business assistance program,[11] has plagued courts

[11] Equal protection challenges to Section 8(a) of the Small Business Act, 67 Stat. 232, 15 U.S.C. § 631, which empowers the Small Business Administration to award noncompetitive contracts to businesses termed disadvantaged, have brought mixed results. Some courts have held that the Section 8(a) program does not violate the Fifth Amendment because the class of persons eligible is not defined racially but by social and economic disadvantage. See, *e.g.*, *Kleen-Rite Janitorial Services, Inc.* v. *Laird*, —— F. Supp. ——, No. 71-1968 (D. Mass., Sept. 21, 1971). Because an overwhelming percentage of 8(a) contracts have been awarded to members of certain minority groups, however, the racial impact of the program leaves in doubt its constitutionality. *See, e.g., Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 334 F. Supp. 194 (S.D. Fla. 1971), *rev'd*, 477 F.2d 696, *reh'g denied*, 478 F.2d 1403 (5th

nationwide. If left unresolved, it may well return to plague the federal courts anew, if not under a future public works program,[12] then most likely under recent legislation extending minority business subcontracting programs throughout the multitude of federal procurement programs.[13]

Cir.), *cert. denied*, 415 U.S. 914 (1973) (district court decision that 8(a) subcontracts could not be awarded noncompetitively overturned on appeal, but on the issue of equal protection, not addressed by the appellate court because plaintiffs found to lack standing, district court found program violative of equal protection). *See generally* Knebel, "Legal Basis for SBA's Minority Enterprise Program," 30 Fed. B.J. 271 (1971); Comment, "Minority Construction Contractors," 12 Harv. C.R.-C.L. L. Rev. 693, 701-15 (1977).

[12] On this Court's remand to the district court in *AGC of California* v. *Secretary of Commerce, supra* note 3, to determine whether the case was moot, the court noted that a Round III to the Public Works Act had been proposed in Congress along with a flexible 2-15% minority quota and 10% nationwide "target." Although the Court acknowledged that the proposed legislation was not enacted, it found that such a proposal "demonstrates that Congres will likely allocate and appropriate further funds using a quota" and thus the quota issue was not moot. (Slip op. at 13-18).

[13] See the programs discussed in the Appendix, *infra*. In its emphasis upon statistical data to support preferences for businesses owned and operated predominantly by certain minority group individuals, the new minority business legislation, discussed *supra* at Part I.B., closely parallels the legislation here challenged. Thus, in establishing the need for disadvantaged business subcontracting plan requirements, the House report stated that:

> "Small business, and in particular, small businesses owned by the disadvantaged, have not been considered fairly as subcontractors and suppliers to prime contractors performing work for the Government. For example, military procurements comprise the largest single portion of the Federal purchase budget, yet in fiscal year 1976 (plus the transitional quarter), minority owned firms received only nine-tenths of one percent of military subcontracts. Large businesses, on the other hand, received 62.5 percent of all military subcontracts. The Department of Defense, despite the extreme and continuous urging by this committee, has not undertaken significant action to increase subcontract awards to small and minority owned firms." H.R. Rep. No. 949, 95th Cong., 2d Sess. 5 (1978).

Equally significant is the fact that the Second Circuit here, like other courts which have addressed this issue, has drawn support for its ruling from equal employment court decisions. The invocation of equal employment case law as precedent either for or against the constitutional validity of the minority business set-aside amendment introduces important implications for the legal application of both sets of laws, and thus warrants review by this Court.

II. THE SECOND CIRCUIT'S RELIANCE UPON THE USE OF AFFIRMATIVE ACTION PROGRAMS IN EMPLOYMENT DISCRIMINATION CASES TO JUSTIFY THE MINORITY BUSINESS SET-ASIDE AMENDMENT ESTABLISHES CONCEPTUAL RELATIONSHIPS BETWEEN THESE TWO AREAS WHICH THIS COURT SHOULD REVIEW AND CLARIFY.

In evaluating the validity of affirmative action programs, and the limitations upon their use, the Second Circuit primarily looked to employment discrimination cases. For the proposition that racial preference is an appropriate remedy to overcome the disadvan-

tages resulting from past discrimination, the court endorsed the district court's reliance upon judicial approval of the Labor Department's affirmative action "Home Town" plans. (Slip op. at 14 and n.11, citing *Associated Gen. Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), and *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 954 (1971)). These plans, however, were expressly addressed to remedying proven egregious and long-standing exclusion of minorities by various construction unions. Thus, in his opinion in *Bakke*, *supra*, Justice Powell cited the "Home Town" cases with approval as good examples of an "administrative body charged with the responsibility of mak[ing] determinations of past discrimination by the industries affected, and fashion[ing] remedies deemed appropriate to rectify the discrimination." 98 S. Ct. at 2754. These cases were disapproved by Justice Powell as precedent for the University of California to implement racial and ethnic "set-asides" in its medical school class based only on statistical disparities in minority representation and without a finding of past discrimination. As in *Bakke*, *supra*, the legislative history here lacks specific findings of prior discriminatory acts in the granting and awarding of contracts. The question therefore remains whether the need to establish findings of discrimination "in the record" (*Id.* at 2759) varies either qualitatively or quantitatively depending upon the governmental source of the racial preference program. Of concern, ultimately, is whether legislative findings, however made, of low representation of minority business participation in federally

assisted or contracted programs may be sufficient to render a racial preference program constitutional, whereas similar findings by an administrative body or court would not render preferential treatment permissible absent a showing of specific discriminatory practices.

In evaluating the equitable limitations placed upon fashioning remedies for past discrimination in the employment area, the Second Circuit also has raised disturbing questions about its own decisions. Noting that the effects of "reverse discrimination" as a remedy should not be concentrated upon a small ascertainable group of non-minority persons, the Second Circuit invoked its decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *reh'g en banc denied*, 531 F.2d 5, *cert. denied*, 429 U.S. 823 (1976). In *Kirkland*, however, the court also made clear that quotas are an extreme remedy which may be imposed only where no adequate relief can be obtained without their use, *Id.* at 427, an issue which was not addressed by the Second Circuit here. Yet, as noted earlier, a finding that alternative means did exist was made explicitly by the district court in *AGC of California* v. *Secretary of Commerce*, *supra*.[14]

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[14] "In this case . . . this Court has previously found, and continues to believe that means of promoting employment of minority group contractors less intrusive than the 10% racial quota enacted by Congress existed. As pointed out in the Court's original decision, the MBE provision does not limit itself to businesses which have previously experienced a prescribed level of income or unemployment. In addition, Congress has never demonstrated that affirmative action plans in this industry are not feasible. Furthermore, the 2-15% MBE

Courts, including the Second Circuit, have exhibited extreme caution in approving, even as remedies, employment schemes that involve preferential treatment of minorities or women who cannot demonstrate that they are the individual victims of discrimination.[15] Thus, the Second Circuit panel's reliance upon employment discrimination cases also needs to be evaluated in terms of *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 46 U.S.L.W. 4966 (U.S. 1978), where this Court declared that an employer's hiring obligation "is [only] to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce."

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provision in the most recent bills introduced in Congress, while still maintaining a quota system, may indeed be less intrusive than the original strict 10% quota system." (*AGC of California*, Slip op. at 28-29).

In recently upholding a city council's affirmative action plan which required a goal of 15 percent minority workers on city jobs, the U.S. District Court for Connecticut invoked both *Bakke, supra* and *Fullilove, supra*, without discussing whether less intrusive means existed to promote minority employment. *IBEW Local 35* v. *City of Hartford, et al.*, —— F. Supp. ——, Civil Action No. H-77-167 (D. Conn., Dec. 11, 1978).

[15] *See e.g., Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g. denied*, 430 U.S. 911 (1977) ("Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm."); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 274 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977) ("[T]he necessity for preferential treatment should be carefully scrutinized and . . . such relief should be required only when there is compelling need for it.").

Id. at 4970. The related issues raised, but not addressed by the Second Circuit panel, are (1) whether Congress may rely upon purely statistical evidence of underrepresentation of minorities to mandate the proportionate representation of racial groups in government procurement programs and if so, (2) whether less rigid remedial principles apply to Congress's authority to set aside contracts to minority business than apply to the power of courts to fashion remedies under Title VII and other equal employment laws.

In sum, because the record here appears to lack Congressional findings of specific instances of past discriminatory acts or policies, at least in terms of identified practices or victims, the question of whether discrimination inferred solely from minority underrepresentation may serve as a valid basis for racial preferences in government contracting is presented for review. Serious splits exist among lower federal courts on the issue, and similar subcontracting programs have been enacted by Congress and promulgated by administrative regulation.[16] It is therefore respectfully urged that certiorari be granted, not only because of "an apparent conflict of approach" to an important constitutional question, *cf. Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 846 (1974) but because of the continuing vitality of the issue, regardless of the status of funds appropriated under the Act here challenged. *Cf. The Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 32 (1958).[17]

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[16] See programs discussed in Part I.B., *supra*, and in the attached Appendix, *infra*.

[17] As to any possible question of mootness, see notes 7 and 12, *supra*.

Moreover, although the issues here have strong similarities to those raised in *Regents of the University of California* v. *Bakke*, *supra*, the need to resolve them is more compelling, because the authority from which the racial preference program derives is not an administrative regulation but the statute itself. It thus raises clear questions concerning Congressional authority and actions. Nor do countervailing constitutional interests restrict the Court's evaluation of this amendment. In *Bakke*, this Court addressed the possibility, and then rejected the need of having to substitute its judgment for the judgment of state educational authorities upon difficult and debatable questions of educational policy with potential First Amendment implications. 98 S. Ct. at 2760-64. In contrast, no conflict arises here between First Amendment and equal protection principles. More simply, the Court is called upon to review directly the constitutional validity of a statute and thus exercise unqualifiedly its duty to police constitutional boundaries.

CONCLUSION

For these reasons, we respectfully urge the Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

SUMMARY OF SIGNIFICANT FEDERAL MINORITY BUSINESS ASSISTANCE AND SUBCONTRACTING PROGRAMS

I. CURRENT PROGRAMS

GOVERNMENTAL SOURCE	PROGRAM	IMPACT
(1) E.O. 11625, the Department of Commerce and other federal agencies.	(a) Office of Minority Business Enterprise (OMBE).	G.S.A. has promulgated regulations requiring that, with certain exceptions, all government contracts in excess of $10,000 include a utilization of Minority Business Enterprise Clause, which obligates the contractor to use its best efforts to maximize MBE subcontracting opportunities consistent with the efficient performance of the contract. 41 C.F.R. Part 1-1.1310-2 (1977).
	(b) Dept. of the Interior MBE subcontracting program.	Temporary rule, promulgated without notice and comment procedures, requiring that federal contractors bidding on nonconstruction contracts exceeding $250,000 set forth detailed plans delineating the amount of contract dollars they will subcontract to minority firms. For construction contracts in excess of $250,000 percentage goals for minority firm subcontracting would have to be set. Agency has set an initial percentage goal of 20%, in most cases. 43 Fed. Reg. 41207 (Sept. 15, 1978).

GOVERNMENTAL SOURCE	PROGRAM	IMPACT
(2) Congress (Railroad Revitalization and Regulatory Reform Act of 1976) and the Department of Transportation. Pub. L. No. 94-210 (90 Stat. 31).	Federal Railroad Administration.	F.R.A. requires contractors under the 1976 Act to establish goals and timetables for minority business and to take affirmative action to increase their utilization.
(3) Congress (Small Business Act of 1953) 67 Stat. 232, 15 U.S.C. §§ 631-647.	Small Business Administration's Section 8(a) program.	S.B.A. enters into procurement contracts with other federal agencies and subcontracts for their performance with small business concerns that are owned by socially and economically disadvantaged persons.
(4) Congress (1961 Amendment to Small Business Act of 1953) 15 U.S.C. § 637(d).	Small Business Administration's Section 8(d) Subcontracting Program.	Program directs the Defense Department, G.S.A., and S.B.A. jointly to develop a subcontracting program for small businesses. Program depends upon voluntary efforts of prime contractors.
(5) Congress (Public Works Employment Act of 1977) 42 U.S.C. § 6705(f)(2).	Minimum 10% MBE provision implemented by Commerce Department's Economic Development Administration (EDA).	Statute [42 U.S.C. § 6705(f)(2)] and regulations required that all grants made under the Act be accompanied by assurances that at least ten percent of grant funds be expended for minority business enterprises.
II. PROPOSED PROGRAM		
Office of Management and Budget.	Office of Federal Procurement Policy proposal concerning subcontracting to minority businesses.	Policy would require that firms bidding on contracts in excess of $500,000 submit detailed plans delineating the amount of contract dollars they will subcontract to minority firms. For construction contracts in excess of $500,000, percentage goals for minority firm subcontracting would have to be set. "Best efforts" clause would be required for contracts under $500,000. 43 Fed. Reg. 14781 (April 7, 1978).
III. NEW PROGRAMS		
P.L. No. 95-507, 92 Stat. 1757, 15 U.S.C. §§ 683 *et seq.* (1978).	Affects both SBA's Section 8(a) and Section 8(d) programs (Part I(3) and (4), above).	(a) Eligibility requirements for both programs would be established. §§ 201 and 211.
		(b) Under 8(d) subcontracting programs, winners of federal contracts exceeding $1 million for construction and $500,000 for other purposes would be required to develop and have approved a minority business enterprise (MBE) subcontracting plan. § 211.
(2) Environmental Protection Agency.	Treatment Works Construction Grants; Policy for Increased Use of Minority Consultants and Construction Contractors.	Policy requires that regional goals be established for minority business participation, and that such goals be implemented by each grantee in cooperation with EPA's Office of Civil Rights and Urban Affairs. 43 Fed. Reg. 60220 (December 26, 1978).

Supreme Court, U. S.
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MAR 28 1979
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No. 78-1007

In the Supreme Court of the United States

OCTOBER TERM, 1978

H. EARL FULLILOVE, ET AL., PETITIONERS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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MEMORANDUM FOR THE SECRETARY OF COMMERCE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-41a) is reported at 584 F.2d 600. The opinion of the district court (Pet. App. 1a-22a) is reported at 443 F. Supp. 253.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1978. The petition for a writ of

certiorari was filed on December 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the minority business enterprise provision of the Public Works Employment Act of 1977 is invalid under the Fifth Amendment to the Constitution or Title VI of the Civil Rights Act of 1964.

STATUTE INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, 42 U.S.C. 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

STATEMENT

1. In the summer of 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999, charged the Secretary of Commerce with the responsibility of dispersing the funds through the Economic Development Administration. The Act provided that the funds were to be available for the period ending September 30, 1977 (Section 111, 90 Stat. 1002). In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects. The total of six billion dollars was to be available for the period ending December 31, 1978 (42 U.S.C. 6710).

The new statute, entitled the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. 6705(f)(2), the "minority business enterprise" provision. Section 103(f)(2) provided that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under the Act * * * unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The circumstances under which the Secretary will waive the 10 percent minority set-aside requirement are de-

tailed in regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)). Congress ensured that funds appropriated under the Act would reach the private sector by requiring state and local grantees to contract with private contractors for the construction of the projects. Section 103(e)(1), 91 Stat. 116, 42 U.S.C. 6705(e)(1).

As authorized by the Act, the Secretary of Commerce issued regulations to implement the minority business enterprise provision. The regulations provided (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434 (1977)):

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

All grants authorized by the Act were awarded by September 30, 1977. The State of New York and New York City were among the grantees awarded funds.[1] Congress has not authorized or appropriated any additional funds to be awarded, and no further funds have been granted or remain to be granted for projects governed by the minority business enterprise provision.

[1] Information submitted at trial reveals that New York State received at least 45 grants totalling $42,119,000 from funds appropriated in 1977 and that New York City received at least 83 grants totalling $193,838,646.

2. On November 30, 1977, petitioners—four associations of construction firms and a mechanical contracting firm specializing in heating and air conditioning work—filed this action in the United States District Court for the Southern District of New York, seeking injunctive and declaratory relief. They contended that Section 103(f)(2) establishes an impermissible racial classification and violates the Fifth and Fourteenth Amendments, the Reconstruction civil rights statutes (42 U.S.C. 1981, 1983, 1985), and Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e). Petitioners sought to enjoin the Secretary of Commerce and the state and local entities that had received funds distributed under the Act from enforcing the minority business enterprise provision in Section 103(f)(2). Petitioners also sought a declaratory judgment that Section 103(f)(2) is "unconstitutional, illegal, void and unenforceable."

The district court denied all requests for relief and dismissed the complaint (Pet. App. 1a-22a). The court held that the minority business enterprise provision of the Act was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry (Pet. App. 5a). The court acknowledged that this provision "distinguishes among various business enterprises, at least in part, based upon the racial background of

their principals" (Pet. App. 9a), but it concluded that the race-conscious provision served "a compelling state interest" (Pet. App. 9a, 10a-17a) and that "other available means of accomplishing the objective would not, in practice, prove to be less discriminatory" (Pet. App. 9a, 17a-20a).

The court of appeals affirmed (Pet. App. 23a-41a). In upholding the minority business enterprise provision, the court stated that it was unnecessary for it to determine "[w]hether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race * * * for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster" (Pet. App. 28a) (footnote omitted). The court of appeals agreed with the district court that the minority business enterprise provision in the 1977 Act was intended to remedy past discrimination against minority construction businesses (Pet. App. 32a). The court also agreed with the district court that there was an ample basis to support Congress' conclusion that the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical exclusion from the mainstream economy and that "the history of discrimination was specific to the construction industry" (Pet. App. 35a-36a).

The court of appeals then analyzed the adverse effect of the minority business enterprise provision on non-minority contractors. The effect, the court concluded, was quite limited and did not fall upon a "'small, ascertainable group of non-minority persons'" (Pet. App. 38a, quoting from *EEOC* v. *Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976). The set-aside for minority contractors, the court noted (Pet. App. 38a-39a),

> extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of [petitioners], who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry. Considering that non-minority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

ARGUMENT

1. The decision of the court below is correct. As we contend in our Jurisdictional Statement (pages 17-24) in *Kreps* v. *Associated General Contractors of California*, No. 78-1382, the minority business enterprise provision of the 1977 Act falls within Congress' authority to fix the terms and conditions under which it grants money, see *Lau* v. *Nichols*, 414 U.S. 563,

569 (1974); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 142-143 (1947); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940), and its special powers to enforce the objectives of the Civil War Amendments, see *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978) slip op. 33 n.41 (opinion of Powell, J.); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). For the reasons stated by the court of appeals in its thorough opinion and in our Jurisdictional Statement in No. 78-1382, Section 103 (f) (2) is consistent with both the Fifth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964.[2]

2. There is no conflict among the courts of appeals. The court below is the only court of appeals to reach the merits of the constitutionality of the statute. The two other courts of appeals that have heard cases involving the provision at issue here have affirmed the denial of preliminary injunctions against enforcement of the provision on the grounds (among others) that plaintiff had failed to show a sufficient likelihood of success on the merits to warrant interim relief.[3]

---

[2] We are furnishing a copy of our Jurisdictional Statement in No. 78-1382 to counsel for petitioners.

[3] *Constructors Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, 580 F.2d 213 (6th Cir. 1978).

Eleven district courts have rejected challenges to the statute. Cases upholding the constitutionality of the challenged provision are: *Rhode Island Chapter, Associated General Contractors of America* v. *Kreps*, 450 F. Supp. 338 (D. R.I. 1978); *Associated General Contractors of Kansas* v. *Secretary of Commerce*, No. C.A. 77-4218 (D. Kan. Feb. 9, 1978); *Indiana Constructors, Inc.* v. *Kreps*, No. IP 77-602-C (S.D. Ind. Jan. 4, 1979); *Associated General Contractors of America, Inc., Alaska Chapter* v. *Kreps*, No. F78-1 (D. Alas. Oct. 10, 1978), appealed filed, No. 78-3421 (9th Cir. Oct. 19, 1978); *Frank Coluccio Construction Co.* v. *Kreps*, No. F78-9-Civ. (D. Alas. Oct. 5, 1978).

Decisions denying preliminary injunctions are: *A. J. Raisch Paving Co.* v. *Kreps*, No. C.A. 77-3977 (N.D. Cal. Dec. 15, 1977), appeal filed, No. 77-2497 (9th Cir. Dec. 20, 1977); *Florida East Coast Chapter, Associated General Contractors of America* v. *Secretary of Commerce*, No. C.A. 77-8351 (S.D. Fla. Nov. 3, 1977); *General Building Contractors Ass'n* v. *Kreps*, No. C.A. 77-3682 (E.D. Pa. Dec. 9, 1977); *Virginia Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978); *Carolinas Branch, Associated General Contractors of America* v. *Kreps*, 442 F. Supp. 392 (D.S.C. 1977); *Michigan Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, No. C.A. M-77-165 (W.D. Mich. Jan. 4, 1978).

Three district courts have rendered decisions adverse to the constitutionality of the statute: *Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977) (unconstitutional as applied); *Montana Contractors Association* v. *Secretary of Commerce*, Nos. CV77-62-M, CV77-153-BLG (D. Mont. Jan. 10, 1979) (unconstitutional as applied); *Associated General Contractors of California* v. *Secretary of Commerce*, 459 F. Supp. 766 (C.D. Cal. 1978), appeals filed, Nos. 78-1107, 78-1108, 78-1114, 78-1382 (Nov. 17, 1978) (unconstitutional on its face).

3. The significance of the issue presented in this case is diminished because the purposes of the statute have already been largely accomplished. All of the funds authorized and appropriated under the Act have been awarded to state and local grantees. The vast majority of contracts have been let. The scattered contracts that remain to be let are outstanding for

special reasons. For instance, they may be for the second or third phase of a project for which later phase contracts are not to be let until the first phase has been completed, or, in the case of defaults on an earlier contract, rebidding may be required. In these circumstances, a decision by this Court on the merits of the constitutional issue would be largely academic. The issues presented by this petition are "too moribund" to warrant this Court's exercise of its certiorari jurisdiction. *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).[4] It is possible that Congress may in the future provide new funding for public works employment acts such as the 1977 Act or enact new legislation providing a preference for minority contractors. But it is likely that any constitutional challenges to such new statutory provisions would arise in a significantly different context. Several public works employment bills were introduced in 1978, although none was enacted. The bills,

[4] Although the scattered contracts that remain to be let appear to be sufficient to render this case not moot at present, it is possible that the case would become moot by the time this Court could consider and decide it. Because the case is before the Court on a petition for discretionary review, it would be unnecessary to remand the case to be dismissed as moot, either now or at any time in the future (compare *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)). Instead, as we suggested in our opposition in *Velsicol Chemical Corp.* v. *United States*, No. 77-900, cert. denied, 435 U.S. 942 (1978), the proper course upon determining that this case is moot and would not otherwise warrant plenary review by this Court is to deny the petition. A copy of our opposition in *Velsicol* has been provided to counsel for petitioners.

however, contained differing minority business enterprise provisions. It is by no means clear that any future legislation will track the minority business enterprise provision at issue in this case. Differences in the congressional findings supporting any new minority business enterprise provisions and in the degree and kind of the minority preference may make a significant difference in the constitutional analysis, as this Court made clear in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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MARCH 1979

[5] If the Court notes probable jurisdiction in *Armistead* v. *Associated General Contractors*, No. 78-1107, and the related cases, Nos. 78-1108, 78-1114, and 78-1382, it may wish to hold this case pending the disposition of those cases.

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In The

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

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In The

Supreme Court of the United States

October Term, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF FOR PETITIONERS

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] is reported at 584 F.2d 600 (1978). It affirms the decision of the United States District Court for the Southern District of New York (Werker, J.), reported at 443 F. Supp. 253 (S.D.N.Y. 1977), which upheld the constitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (hereinafter "PWEA" or the "Act").

JURISDICTION

A Petition for Certiorari was filed on December 21, 1978, within 90 days of the entry of judgment of the Second Circuit Court of Appeals on September 22, 1978. Certiorari was granted by this Court on May 21, 1979. The Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Congress' requirement that 10% of federal grants for local public works projects be set aside for minority business enterprises is constitutionally permissible under the Due Process or Equal Protection Clauses of the Federal Constitution.

2. Whether the minority set-aside is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

1. Oakes, Circuit Judge; Blumenfeld, Senior District Judge for the District of Connecticut; Mehrtens, Senior District Judge for the Southern District of Florida.

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) provides for the 10% minority business set-aside:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

The petitioners are comprised of various individuals and contractor groups which perform both general contracting and specialty subcontracting work on various construction projects including those let by the State and City of New York and their various agencies (A8a-9a).*

Petitioners challenge the constitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. §6705(f)(2) (A7a-8a), and its compliance with Title VI of the Civil Rights Act of 1964.

The PWEA was enacted by Congress on May 13, 1977. Purportedly, it was intended to correct certain inadequacies in the Local Public Works Capital Development and Investment Act of 1976, 90 Stat. 999-1002, Pub. L. No. 94-369 (the "LPWA") and to increase the funding of the LPWA by an additional four billion dollars.

The intentions of Congress in enacting the LPWA, as reported by the Committee on Public Works and Transportation of the House of Representatives were twofold: (1) to alleviate the problem of national unemployment, and (2) to stimulate the national economy by assisting state and local governments to build badly needed public facilities. *See,* H.R. Rep. No. 94-1077, 94th Cong., 2nd Sess., 1976 U.S. Code Cong. & Ad. News, Vol. 3, pp. 1746-7 (1976).

Pursuant to the enactment of the LPWA on July 22, 1976, the Economic Development Administration (the "EDA"), under

* Numbers in parentheses preceded by "A" are references to pages of the Appendix to the brief.

the direction of the Secretary of Commerce, commenced processing applications from state and local governments for assistance under that Act for the construction of local public works projects. Between October 26, 1976 and February 9, 1977 (hereinafter referred to as "Round I"), the EDA processed and approved approximately 2,000 projects and thereby exhausted the full two billion dollar Congressional appropriation for the LPWA.

When it became clear that the LPWA was not adequately fulfilling the intentions of Congress, public hearings were held by the House Subcommittee on Economic Development during January and February of 1977, which hearings clearly showed:

> ". . . that the next round of funding should do a better job of —
>
> 1. Insuring a more equitable distribution of projects.
>
> 2. Simplifying administration by making the program regulations more easily understood.
>
> 3. Reflecting local priorities.
>
> 4. Eliminating 'gerrymandering' of project areas so that program investments are oriented more toward the areas of greatest distress."

H.R. Rep. No. 95-20, 95th Cong., 1st Sess., 1977 U.S. Code Cong. & Ad. News, Vol. 5, pp. 717-18 (1977).

That same subcommittee thereafter recommended that H.R. 11, the House version of PWEA, be enacted as reported and concluded that the amendments made by the bill to the LPWA

would meet the four (4) objectives set forth above, H.R. Rep. No. 95-20, *supra,* at pp. 3, 11. This report was issued on February 16, 1977. On February 24, 1977, on the floor of the House, during the debate on H.R. 11, an amendment was offered by Representative Parren Mitchell (D. Md.) 123 Cong. Rec. H. 1441 (February 24, 1977). This amendment, with slight modification, was approved and eventually enacted as Section 103(f)(2), 42 U.S.C. Section 6705(f)(2), and is now known as the Minority Business Enterprise ("MBE") provision. (*See,* p. 3, *supra*). The Mitchell amendment had not been previously considered by any House committee or subcommittee and there is no legislative history surrounding its passage. However, after brief debate, primarily concerning whether or not areas without a sufficient MBE population would be hindered, the amendment was approved on the floor of the House. *See,* 123 Cong. Rec. H. 1436-1441 (February 24, 1977).

The final version of PWEA, containing the MBE provision, was enacted by Congress on May 13, 1977 and initiated a second flow of funding (hereinafter referred to as "Round II").

Pursuant to the terms of the PWEA, the local Grantees, including the City and State of New York, have received federal funding for various municipal projects (A4a). These projects have been let under contracts, the terms of which include the various MBE requirements.

SUMMARY OF ARGUMENT

For the first time this Court is presented with the question of the validity of a Congressional enactment providing for a mandatory racial classification in the form of an employment quota for contractors on federally funded public works projects. Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), creates a classification based upon race by providing that 10% of the monies appropriated thereunder must be expended for minority business enterprises. The present state

of the law on the subject is that racial classifications are presumptively invalid and can be invoked only upon a showing of extraordinary justification. In order for a racial classification to pass constitutional muster, a compelling state interest must be shown, and such classification must be both necessary and the least discriminatory means available.

No compelling state interest was recognized by Congress as a reason for creating such a classification, as is demonstrated by the fact that such set-aside was an 11th hour amendment added to a public works appropriation bill, and was not the subject of any meaningful debate.

Moreover, there exist several less discriminatory means available to Congress to accomplish the intended purpose, such as a racially neutral set-aside similar to that provided under the Small Business Act, 15 U.S.C. §637. In any event, the record is barren of any indication that Congress even attempted a search for a less discriminatory means.

Additionally, the set-aside is in direct violation of Title VI of the Civil Rights Act of 1964 which has established a deep-rooted, carefully-considered policy of colorblindness in the distribution of federal funds. The overwhelming principles of equality and non-discrimination embodied in Title VI cannot give way to a racially based set-aside offered only as a result of an afterthought to an appropriations measure designed to stimulate the economy. That portion of the Public Works Employment Act of 1977 mandating a racially based set-aside must therefore be held void and unenforceable.

ARGUMENT

I.

SECTION 103(f)(2) OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977, 42 U.S.C. §6705(f)(2), IS VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION.

It should be noted at the outset that this is *not* a case involving employment discrimination or an attempt to remedy the effects of some perceived past employment discrimination. The challenged amendment to the PWEA concerns itself only with a racial classification, that is the setting aside and obtaining for Minority Business Enterprises exclusively at least ten percent of the funding provided for under the Act. Accordingly, we are dealing here with an attempt to secure, *on the enterpreneurial level,* work for a limited class of minority controlled *businesses.* In attempting to accomplish this purpose, Congress has established a *mandatory,* fixed racial quota in regard to participation in the funding provided under the Act.[2]

---

2. The foregoing distinction (employment discrimination as opposed to the alleged underutilization of minority businesses) is important to the Court's determination herein because it narrows the issues significantly and eliminates from unnecessary consideration that body of cases dealing with minority employment discrimination and the various remedies imposed to eradicate it. We submit that, contrary to the findings of the courts below, cases such as *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); and *Equal Employment Opportunity Commission v. Local 638,* 532 F.2d 821 (2d Cir. 1976), to name only a few, have no application to the case at bar. Those cases deal with court or administratively fashioned affirmative action remedies for found patterns and practices of employment discrimination by labor unions. The facts of those cases do not warrant tarring the entire construction industry with the same brush.

For the first time this Court is being asked to pass upon the constitutionality of a Congressionally imposed racial quota where there has been no expressed finding of active racial discrimination in the area covered by the statute, namely, the hiring of minority business enterprises in the construction industry at large. As with the special admissions program in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the MBE set-aside is unquestionably a classification based on race and ethnic background.

The threshold consideration in this case is the fact that racial quotas are presumptively invalid. As this Court stated in *Personnel Administrator of Massachusetts v. Feeney,* 99 S. Ct. 2282, 2292 (1979):

> "Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." (citations omitted)

This presumption of invalidity and its necessary ramifications was totally ignored by the Court of Appeals for the Second Circuit in this case.[3] Instead, that court adopted the

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3. This failure is understandable in view of the fact that the *Feeney* case was decided subsequent to the Circuit Court's decision in this case, and accordingly, that court did not have the benefit of this Court's definitive statement quoted above.

somewhat deferential position that "a large measure of judicial restraint must be accorded Congress in its enactment of legislation to remedy past discrimination . . ." (A214a). Having adopted this approach initially (and in so doing decided the issue) the court went on to strain at every turn to uphold the validity of the racial classification contained in the legislation.

There is, we submit, an obvious and critical difference between a judicial inquiry into the validity of a statute where there is a "presumption of invalidity" requiring an "extraordinary justification," and the deferential approach to the racial classifications embodied in the Second Circuit Court's decision herein. In view of the presumed invalidity of racial quotas, the proper standard of review by the court below should have been the "strict scrutiny" test developed by this Court in *Loving v. Virginia,* 388 U.S. 1 (1967) and *Dunn v. Blumstein,* 405 U.S. 330 (1972). Instead, the Second Circuit Court fashioned a new "fundamental fairness" test — a test which does not comport with any presently recognized judicial standard of review in cases such as this. It is respectfully submitted that the following observation of Chief Justice Burger in his dissenting opinion in *United Steelworkers of America v. Weber,* 47 U.S.L.W. 4851 (1979) is apropos to the decision below:

> "What Cardozo tells us is beware the 'good result' achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at 'good ends'." *Id.* at 4858 (Burger, J. dissenting).

If the imposition of mandatory racial quotas is to become a valid and acceptable means of eradicating the

effects of past societal discrimination then more is required by way of "extraordinary justification" than the mere imputation of a Congressional perception of past discrimination and the application of a "fundamental fairness" test to the proposed remedy as the courts below have done. We turn now to an analysis of why this Court should apply the proper test and, by so doing, reach the conclusion that the imposed racial quota is unconstitutional.

Strict Scrutiny Is the Appropriate Standard

It is petitioners' contention that the 10% MBE requirement, which established a racial classification in the form of a quota system, invidiously discriminates against them and other non-minority businesses in violation of their constitutional rights under the Fifth and Fourteenth Amendments. As cited in Justice Powell's opinion in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978): "Racial and ethnic classifications, however, are subject to stringent examination . . . ." They "call for the most exacting judicial examination." *Id.* at 290-91. Under either the Fifth or Fourteenth Amendments, extraordinary justification and strict scrutiny is therefore applicable to all racial preference cases.

In order to justify a classification based upon race, it must first be shown to be necessary to the furtherance of a compelling state interest and, secondly, be the least discriminatory means available to accomplish a valid state objective. As outlined above, the Circuit Court not only found no extraordinary justification for the racial classification but it also failed to heed Mr. Justice Powell's formulation in *Bakke* that such racial classification must be *precisely tailored* and work the *least* harm possible to innocent persons. *Regents of the University of California v. Bakke,* 438 U.S. at 308. Rather, the Court of Appeals in this case merely substituted its judgment in place and stead of the appropriate standard and found that so long as

the remedies based upon the classification are "appropriately drawn", and do not exceed "fundamental fairness", such reverse discrimination will be sustained (A219a-220a). This novel Court of Appeals fashioned test does not even subject the racial classification to the more relaxed standard of review as expressed by Mr. Justice Brennan's opinion in *Bakke*, namely, that not only must such remedy be substantially related to the achievement of important governmental objectives, but it also must not stigmatize any group or single out those least represented in the political process to bear the brunt of the benign program. *Regents of the University of California*, 438 U.S. at 360-61.[4]

The stigmatization in the case at bar is obvious. Similar to the special admission program struck down in *Bakke*, those contractors who do not fit within the select MBE category are denied a chance to compete for the special set-aside monies no matter what the quality of their work product or the extent that they underbid an MBE on a public works project. *See e.g., Regents of the University of California v. Bakke*, 438 U.S. at 319-21. By like token, there is no limit to the amount of work which the preferred MBE class can secure. In addition, as noted by the court below, when Congress exercises its spending powers, it must do so in a non-discriminatory manner since:

> "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols*, 414 U.S. 563, 596 (1974) (quoting from the remarks of Senator Humphrey, 110 Cong. Rec. 6543 (1964)).

4. Mr. Justice Brennan's opinion in *Bakke* also held that in reviewing racial classifications, it is inappropriate to inquire, as the Circuit Court in this case has done, only as to whether there is any conceivable basis that might sustain such a classification. 438 U.S. at 361.

Further, consideration must be given to the stigmatization attendant upon the awarding of contracts where the individual or entity involved is shielded from competition and receives a business benefit solely on the basis of race. Not only is such a situation individually demeaning, but in addition, it perpetuates a system of non-accomplishment which hardly serves as a stepping stone for entrance into a system of free enterprise.

In regard to the use of quotas, perhaps one of the most incisive commentaries on the issue comes from two distinguished members of the minority community, Messrs. Bayard Rustin and Norman Hill of the A. Phillip Randolph Institute:

> "There are those who argue that, on a short term basis, quota hiring schemes represent an effective and expedient means of resolving a difficult social problem. But we are convinced that the inherent dangers of the quota principle far outweight any temporary gains they might bring.
>
> One of the most serious dangers of the quota doctrine is that it will perpetuate the stereotypical — and profoundly mistaken — view that blacks lack the ability and the will to make it on their own. Should quotas become institutionalized as government policy, society, as black educator Thomas Sowell has warned, would no doubt conclude that Negroes 'must be given something in order to have something.'
>
> Quotas would further entrench the tendency of society to respond to the call for equal opportunity with tokenism. Quotas, in fact, are tokenism taken to its logical conclusion. Blacks object to the token because it downgrades the dignity and abilities of the individual, cheapening

> both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota, only to a greater degree. The black who benefits from the quota suffers the uncertainty of never knowing whether he made it on his merits, or was simply hired to meet a government decree. As for the dominant white society, it would automatically question the abilities of all blacks, including the overwhelming majority who have succeeded because of their intelligence, skills and self-discipline."[5]

A.

As to the Lack of a Compelling Governmental Interest

In an effort to prove the first prerequisite, a compelling governmental interest, the government argued in the District Court that such interest is shown by (1) the legislative history behind passage of the MBE requirement; (2) the statistical studies showing a lack of MBE participation in the economy; and (3) various executive orders and programs which evidence a governmental interest in aiding minorities. None of these factors, however, support a compelling governmental interest or an "extraordinary justification" sufficient to sustain a racially discriminatory federal statute.

The Legislative History Fails to Evince Findings of Prior Discrimination Sufficient to Justify Upholding the MBE Amendment

It is important to note that Congress' expressed purpose in enacting the PWEA was "to help revitalize the nation's

5. Testimony, *Federal Higher Education Programs — Institutional Eligibility: Hearings on Civil Rights Obligations Before Special Subcommittee on Education of the House Committee on Education and Labor*, 93d Cong., 2d Sess., Part 2A at 253 (1974).

financially pressed communities and reactivate the distressed construction industry with its hundreds of thousands of jobless workers . . ." H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1 (1977). Wholly absent from the legislative history is any indication that Congress truly considered the advancement of MBEs to be of compelling governmental concern *within the context of the PWEA*.

As noted above, the imposition of a racial classification requires "extraordinary justification". Justice Powell's opinion in *Bakke* also states that "preferential classifications" are invalid in the absence of detailed legislative, judicial or administrative findings of proven constitutional or statutory violations. *Regents of the University of California v. Bakke*, 438 U.S. at 302 n. 41.[6] The question therefore is whether or not Congress has made the requisite detailed findings of constitutional or statutory violations sufficient to constitute the extraordinary justification required to sustain the racial classification in question. The answer clearly is that Congress has not.

It is submitted that the legislative history of the PWEA is completely devoid of any legislative findings or any other material sufficient to satisfy the extraordinary justification required to uphold the racial classification provided in Section 103(f)(2) of the Act. Indeed, the remarks of various advocates of the set-aside amendment on the floor of the House clearly show that the set-aside amendment in favor of MBEs was an afterthought designed to give the minority business community a "share of the action from this public works legislation." 123 Cong. Rec. H. 1736 (1977).

The scant remarks of Representative Mitchell in connection with sponsoring the amendment have been accurately

6. Mr. Justice Brennan's opinion in *Bakke* likewise required appropriate findings by the legislative body with competence to act in this area. *See* 438 U.S. at 363-64.

characterized by one court as being far from legislative history and merely "the debate rhetoric of a partisan who sponsored the amendment." *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 969 (C.D. Cal. 1977), *vacated and remanded,* 438 U.S. 909, *on remand,* 459 F. Supp. 766 (C.D. Cal. 1978), *appeal docketed sub nom. Armistead v. Associated General Contractors of California,* 47 U.S.L.W. 3563 (U.S. Jan. 15, 1979) (No. 78-1107). As further pointed out in *Associated General Contractors, supra,* Representative Mitchell's remarks concerning the rate of underutilization of MBEs were merely naked assertions on his part and never the subject of a Congressional study. *Id.* at 965. Thus, the record is totally devoid of the detailed legislative findings necessary to support the racial classification in question.[7]

Even in the context of upholding the statute, another court has found this complete lack of legislative history to support the purpose of the statute to be "troublesome". *Constructors Association of Western Pa. v. Kreps,* 441 F. Supp. 936, 952 (W.D. 1977), *aff'd,* 573 F.2d 811 (3d Cir. 1978).

As noted above, what is legislative history showing the clear intent of the Congress, as opposed to mere debate rhetoric, is the fact that the PWEA, Round II, was intended to focus upon the sole objective of reducing unemployment. [*See, Hearings on H.R. 11 and Related Bills, Subcommittee on Economic Development of the Committee on Public Works and Transportation,* H. Rep. No. 95-14, pp. 2-3 (1977).] The four billion dollars provided by the PWEA was expected to generate 300,000 construction industry jobs and 300,000 jobs in other industries. No mention of any special assistance to MBEs was ever indicated or suggested until Representative Mitchell introduced his last minute amendment to the Bill on the floor of the House.

7. The MBE amendment sponsored by Representative Mitchell was never even considered by the House Judiciary Committee, nor by House Report No. 914, which reported the Bill to the House Floor without the amendment. *Associated General Contractors of California, supra,* 441 F. Supp. at 969.

Under such circumstances and especially in the face of a presumption of invalidity it is not the function of the courts to embark on a search outside of the legislative record in an effort to sustain the racial classification. Yet, this is exactly the procedure the courts below utilized.

The Second Circuit Court of Appeals, although reaching the obvious conclusion that legislative consideration of the MBE amendment was indeed "sparse", relied upon its sponsor's off the cuff remarks in concluding that the construction industry had been guilty of past discrimination (A217a). These limited remarks, coupled with the Second Circuit Court of Appeals' totally unsupportable statement that the lack of Congressional discussion was understandable in light of "the knowledge of the congressman concerning the well-established history of past discrimination in the construction industry" (A217a n. 10), formed the basis for upholding what amounts to a wholesale indictment of the construction industry at large. The Second Circuit Court of Appeals' analysis of the record thus presumed the very fact in issue, aided only by the unexpressed mental processes of Congress.

The Statistical Shell Game

The District Court also felt compelled to reach outside the realm of the Congressional debates surrounding the MBE amendment. Noting that the available empirical data resolved any doubt that the Congressional purpose in enacting the amendment was to remedy prior wrongs to minority groups, (A193a-195a), the District Court concluded from the statistical evidence, that Congress could reasonably have found prior racial discrimination as the cause of the underrepresentation of MBEs in the economy and accordingly fashioned an appropriation set-aside (A196a). The District Court thus, in effect, conducted a broad and far-reaching survey of MBE participation in the economy, and came to an overall conclusion that such participation was "disgraceful" (A198a).

Thus, the statistical evidence considered related *not* solely to one employer's hiring practices with respect to minorities, as would be relevant in a Title VII action. Rather, the Court's conclusion was based upon its own nationwide survey of the construction industry. In this regard, the Supreme Court has held that:

> "It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and *one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." Craig v. Boren,* 429 U.S. 190, 204 (1976). (emphasis added)

The District Court's undertaking of the statistical analysis, as it did, was in essence a sociological evaluation of the overall scheme of minority participation in the construction industry. If relevant at all to the constitutionality of the MBE provision, it was necessary for such a finding to be made by the Congress alone.

In order to justify Congress' action in this case, the District Court merely utilized the statistics contained in Government's Exhibit 2 relating to minority businesses and their receipt of national gross business receipts (A193a-197a). However, the statistical evidence considered by the District Court was, at best, unreliable and inconclusive. The Court failed to note that the government's critique of its own data-collecting processes found those procedures to be "inadequate and inconsistent" (Gov. Ex. 1 at p. 111).[8] Other indicators demonstrated that between the

8. Page references with respect to Gov. Ex. are to the page in the Exhibit itself and not the Appendix.

years 1969-1972, there has been a dramatic *increase* of minority contractors and dollar receipts of minority owned construction businesses, to wit, 34.28% and 84.45% respectively. [1972 Survey of Minority Owned Business Enterprises, Table i at pp. 16-17 (U.S. Dept. of Commerce, Bureau of The Census Special Report 1975) (hereinafter "1972 Survey").] Furthermore, in the *three year period* between 1969-72, gross receipts of minority firms with paid employees increased a total of 54.4% (1972 Survey at 16-17) as opposed to a parallel increased of only 60% for *all* construction firms with a payroll for the *five (5)* year *period* 1967-72, rather than a three (3) year period. [1972 Census of Construction Industries at pp. 1-7 (U.S. Dept. of Commerce, Bureau of the Census 1976)].

Moreover, any surveys considered by the court below are classified *not* according to the incoming MBE participation with respect to the overall participation in the construction industry *subsequent* to 1965 (the effective date of Titles VI and VII of the Civil Rights Act of 1964), but rather are predicated upon the combined percentage of minority participation both *before and after* the effective dates of such acts. Such data formed the basis for the District Court's finding that MBEs have been historically excluded from the mainstream economy (A193a-194a). Additionally, it is to be pointed out that a low representation of minorities can be found only if *both* the pre-1965 and post-1965 periods are taken into account together. The relevant data to be considered by this Court in its determination as to whether the statistical data supports a compelling governmental interest and authorizes such a drastic remedy as racial quotas is the post-1965 data *only* relating to MBE participation in the economy. Contrary to the District Court's findings (A196a n.13), the Civil Rights Act of 1964 is not irrelevant when later legislation providing for a presumptively invalid racial classification is fashioned to remedy discrimination.

An analogous case, *Equal Employment Opportunity Commission v. Local 14,* 553 F.2d 251 (2d Cir. 1977), squarely

held that the relevant statistical evidence to be considered in determining whether a pattern and practice of discrimination warranted the imposition of a racial quota must be based upon data completed *subsequent* to the effective date of Title VII. *Id.* at 255. Where the post-1965 statistics show that minorities are receiving their "fair share" of the relevant employment opportunities, there is *no* compelling need for imposition of a quota. *Patterson v. American Tobacco Co.*, 535 F.2d 257, 275 (4th Cir. 1976). In this connection, the record is completely devoid of any evidence indicating that minority businesses have been the subject of discrimination *after* the effective date of Title VII. On the contrary, increases of 34% and 84% in numbers and dollar receipts, respectively, of MBE construction firms prove to the contrary (1972 Survey at pp. 16-17).

Finally, with respect to its statistical findings, the District Court referred to language from a House Subcommittee Report finding that past discriminatory practices affect our present economic system and noting a business system which "traditionally excluded measurable minority participation" (A195a-196a). However, careful examination reveals that the former statements were made by that subcommittee in connection with discrimination against minorities perpetuated by bonding sureties and *not* by other contractors or potential employers (Gov. Ex. 4 p. 182). And to the extent that the committee's assertion of "traditionally excluded minority participation" is supportive, it is respectfully submitted that Congress has already enacted remedial legislation in Title VII to combat the present consequences of past discrimination. *Patterson v. American Tobacco Co.*, 535 F.2d at 267. Thus, governmental or private actions under Title VII are a more appropriate means of fashioning a remedy for the vestiges of pre-Civil Rights Act discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364-65 (1977).

The tortured analyses of the scant and unreliable data relied on by the courts below, as well as the comments of the court in *Constructors Association of Western Pennsylvania*, with respect to such data, 441 F. Supp. at 951, 953, should lead this Court to the conclusion that such data is insufficient to meet the traditional rigors of establishing a compelling governmental interest and extraordinary justification for the racial classification.

B.

As to the Least Onerous Means

The second test, which the challenged amendment must satisfy (assuming, *arguendo*, that the compelling governmental interest test, *supra*, has been met), is that the means used is both necessary to the accomplishment of the governmental interest *and* the least discriminatory means available. The judicial standard of review in this regard was set out by this Court in *Dunn v. Blumstein*, 405 U.S. at 342-43 where it was held:

> "Statutes affecting constitutional rights must be drawn with 'precision', *NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson, supra*, at 631 and if there are other reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference, [but] must choose 'less drastic means'. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)." *Dunn v. Blumstein, supra*, 405 U.S. at 343.

Similarly, in *Bakke* this Court (Powell, J.) held that, assuming a legislative finding of constitutional or statutory

violations, the remedial action taken must work the least harm possible to other innocent persons competing for the benefits. *Regents of the University of California v. Bakke,* 438 U.S. at 308 (1978).

The questions presented here are whether a fixed racial quota is necessary to remedy the effects of societal discrimination and if so whether such quota imposes the least harm on those non-minority businesses that traditionally compete for that portion of the work now reserved for MBEs. We submit that the answer to both these questions is a resounding "No", particularly in view of the repugnance of racial quotas to the basic concepts of a democratic society.

It is first noted that the 10% MBE set-aside is not a necessary means to accomplish the governmental objective of getting MBEs into the mainstream of the economy. As pointed out above, the biggest problem among minority contractors is insufficient working capital. (Gov. Ex. 1 at p. 24, Table 7). The lack of knowledge of future bidding opportunities ranks second. (*Id.*). That same report accordingly recommended that various civilian agencies make cash advances to minority contractors to assist them in meeting working capital needs, as currently *authorized* by 41 C.F.R. §1-30.400 (Gov. Ex. 1 at p. 130 para. III). The existing Section 8A of the SBA program should also be utilized to its maximum benefit. (*Id.* at p. 132 para. V). (*See* Gov. Ex. 4 at p. 147, suggesting consideration of a set-aside for disadvantaged firms.)

In sum, mechanisms presently exist which, if judiciously and efficiently applied, will accomplish the desired result without having to exclude anyone from participation in federally funded construction work. In any event, on the federal, state and local level, Gov. Ex. 1 indicates that any effort to increase minority participation in government contracts should be commensurate with the present minority participation in the

economy. (Gov. Ex. 1 at p. 129, para, I; 138 para. A(1)). The systematic exclusion of non-minorities from participation in Round II is just not necessary to solve the problems of MBEs.[9]

Central to Justice Powell's idea of a constitutionally valid affirmative action program is governmental support of such program. Aside from the question of Congress' competence to act in the MBE situation, is the question of the basis for their acting at all. Clearly, the proponents of a program providing for mandatory racial quotas must bear the rigorous burden of showing that the program has as its basis a detailed examination of the problem to be remedied as well as an extensive examination of possible alternatives to the use of racial classifications. *Cf. Regents of the University of California v. Bakke,* 438 U.S. at 302-307; *Dunn v. Blumstein,* 405 U.S. at 343.

The prime consideration in this case is the effect which the MBE set-aside provision has on those non-minority subcontractors that traditionally perform the work now reserved for MBEs. The Second Circuit Court, in dealing with such subject found that since minority-owned businesses amount to only 4.3 percent of the total number of firms in the industry, "the burden of being dispreferred in .25 percent of the total opportunities in the construction industry was thinly spread among non-minority businesses comprising 96 percent of the industry." (A221a). In making this finding, such Court ignored the reality of the situation.

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9. It is to be noted that the court in *Constructors Ass'n of Western Pennsylvania, supra,* suggests that the 10% preference given to minorities will increase their participation in terms of the MBE percentage with respect to *all* contractors. 441 F.Supp at 953. This is completely erroneous, since the EDA Guidelines (A129a-155a) stifle the current percentage of MBE participation in the construction industry as a whole, by refusing to recognize as a *bona fide* MBE one which is created *solely* to take advantage of the minority benefits under the Act. Thus, the anomolous effect of the EDA guidelines is to freeze the number of MBEs as of the effective date of the Act rather than increase the overall MBE participation as intended (132a, para. 2).

In practical application the work which is set aside pursuant to the PWEA is not work traditionally performed by 100 percent of the industry. Rather it is work which, because of its limited size or specialized nature, is customarily performed by a limited number of small firms which, due to their size and limited finances and expertise, specialize in performing such work (A65a-66a, A89a-91a). Thus, the dispreferred group is a limited, readily identifiable group of small specialty subcontracting firms, many of which may be every bit as socially and economically disadvantaged as are the minorities defined in the Act. The devastating impact of the Act's MBE set-aside on the business of a first generation non-minority immigrant sidewalk installer, for example, must be considered in determining whether an outright mandatory minority set-aside is the least onerous means of eradicating the effects of past discrimination. Surely, it is not constitutionally permissible to elevate the status of one group through the destruction of another, especially where there are less onerous alternatives available.

In *Kirkland v. New York State Dept. of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), *reh. denied,* 429 U.S. 1124 (1977), a civil service examination for promotion to the grade of sergeant was found to be discriminatory against Blacks and Hispanics. The District Court ordered the preparation of a new examination and further ordered the promotion of at least one Black or Hispanic employee for every three white employees promoted until the combined percentage of Black and Hispanic sergeants equaled the combined percentage of Black and Hispanic correction officers. The Second Circuit Court, in reversing the District Court's imposition of this racial quota, referred to previous cases imposing racial quotas and noted that:

> "In each of these cases there was a clearcut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination. In the instant case, there is insufficient proof of the former and substantial evidence of the latter." 520 F.2d at 427.

The Circuit Court went on to hold:

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white. As to such a situation, the following comments of Judge Mulligan in *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra,* are most pertinent:
>
> > 'We are discussing some 117 positions with time-in-grade requirements mandating three years' service as patrolman, sergeant and lieutenant postponing promotion to captain for a minimum of nine years. While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color

> alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.'" 520 F.2d at 429 (footnote omitted).

Thus, in a case where, after a full trial of the facts, discrimination was found to exist (which is not the case with the Congressional action at issue here), the Court, finding evidence of reverse discrimination in the imposition of a racial quota (which *is* the case here), refused to permit the quota to remain in effect, such Court noted in the process that:

> "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." 520 F.2d at 427.

Not sitting as a super legislature but just following that standard of review applicable in determining whether the MBE set-aside provision is necessary and the least discriminatory means, this Court can and must find that there are other alternatives available which do not systematically exclude non-minorities (disadvantaged or otherwise) from participating in federal employment solely because of their race. When the objective is to help disadvantaged minorities, the end may be achieved by making use of classifications less repugnant than fixed racial quotas. One alternative would be to aid the economically and socially disadvantaged of *all* races. As pointed out in *Associated General Contractors of California, supra,* racially neutral legislation invoking a 10% set-aside could be directed at those businesses which have experienced a low level of employment for a particular year. The Commerce Department could then take affirmative steps to ensure that businesses in areas of high unemployment become particularly aware of federally funded projects being planned, and assist such

businesses in familiarizing themselves with the larger general contractors who customarily bid on federally funded projects. Such an approach clearly would have less detrimental and discriminatory impact upon small non-minority contractors. It is also safe to assume that through the use of such an approach, many MBEs will be included in the preferred class, thus accomplishing, through racially neutral means, the desired objective of advancing MBEs.

In addition, not all preferential set-asides must be racially oriented. An example of a racially neutral set-aside is contained in the recent amendment of Section 8(d) of the Small Business Act (Public Law 95-507, effective October 24, 1978). This amendment provides that it is the policy of the United States that small businesses owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of federal contracts. In furtherance of this objective the amendment provides in substance that each solicitation of a bid for any federal contract shall contain a clause requiring a successful bidder to submit a subcontracting plan, which among other things, includes a recitation of the percentage goals for the utilization as subcontractors of small businesses owned and controlled by socially and economically disadvantaged individuals. The new law provides that the term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall include "Black Americans, Hispanic Americans, Native Americans, and other minorities, *or any other individual found to be disadvantaged.*" 15 U.S.C. §637(d)(3)(C) (emphasis added).

Thus, Congress has removed from the amendment to the Small Business Act the two unconstitutional thorns contained in the PWEA. Congress has removed the mandatory set-aside in favor of a goal and, most importantly, eliminated the exclusively racial nature of the preference by making it apply to economically disadvantaged concerns, whether minority controlled or otherwise.

Whether Public Law 95-507 indicates a Congressional realization of the problems inherent in the PWEA set-aside is yet to be seen. However, unless the constitutionality of the set-aside is addressed by this Court, the concept of the minority preference or set-aside will continue long after the funding provided for in the PWEA has been expended. In enacting the PWEA set-aside amendment, Congress has, without doubt, inaugurated the age of racial quotas.

It is clear from the foregoing that, as a mere addendum to a Congressional funding bill, the 10% MBE set-aside provision does not meet the *Bakke* test of being precisely tailored to serve a compelling governmental interest. *Regents of the University of California v. Bakke,* 438 U.S. at 308. The provision, moreover, "does not work the least harm possible to other innocent persons competing for the benefit" as provided for in *Bakke* and is consequently not the least detrimental means of remedying any evidences of past societal discrimination. Under a strict scrutiny analysis, the 10% MBE requirement is therefore unconstitutional.

II.

SECTION 103(f)(2) OF THE PWEA, 42 U.S.C. §6705(f)(2) IS IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et. seq.* provides that:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving financial assistance."

All federal departments and agencies which extend federal financial assistance are compelled to effectuate the provisions of this section. 42 U.S.C. §2000d-1. The Second Circuit Court of Appeals completely failed to consider whether the Congressional mandate embodied in §601, invalidated the MBE preferential disbursement of federal monies; rather, the Court therein looked only to the constitutional issues in reaching its decision. Before reaching constitutional questions, however, the better practice would have been for the Court of Appeals to consider whether the statutory grounds might be dispositive. *New York City Transit Authority v. Beazer,* 99 S. Ct. 1355, 1364 (1979); *see also, Rescue Army v. Municipal Court,* 331 U.S. 549, 568-69 (1946).

Title VI is a distinct statutory prohibition, enacted at a specific time in our history to "insure that *no person* in the United States is excluded from participation in, denied the benefits of, or subjected to discrimination on the grounds of race, color or national origin under any program or activity receiving Federal assistance." H.R. Rep. No. 914, Part I, 88th Cong., 1st Sess. 25 (1963) (emphasis added). Its provisions are unmistakable in terms of the Congressional policy in enacting a statutory framework of equal protection and nondiscrimination guarantees for *all* Americans. *See* 1964 U.S. Code Cong. & Ad. News at 2400-01 App. E. Accordingly, the plain language, policy and dictates of Title VI, prompted two District Courts in "reverse discrimination" cases to strike down the use of federal funds in favor of one race to the detriment of others. *See Flanagan v. President & Directors of Georgetown College,* 417 F. Supp. 377, 384 (D.D.C. 1976); *Cramer v. Virginia Commonwealth University,* 415 F. Supp. 673, 681 (E.D. Va. 1976).

In this Court's recent decision in *Regents of the University of California v. Bakke,* 438 U.S. 265, five justices reached the constitutional issue presented by Davis' Special Admission Program, stating that the term "discrimination", as it is used in §601, is susceptible to varying interpretations and was thus consciously chosen by the drafters to permit a flexible, constitutionally grounded view of what would be impermissible

differentiation under that Act. The majority found that Title VI proscribes only those racial classifications that violate the Equal Protection Clause or the Fifth Amendment. 438 U.S. at 287 (Powell, J.); *id.* at 328 (Brennan, J.).

Prohibiting "discrimination" in the distribution of federal funds however does not define the full extent of Title VI. The statutory scheme embodied therein also states that no person shall on the ground of race be "excluded from the participation in" or "be denied the benefits of" any program or activity receiving federal funds. Whether or not the prohibition against "discrimination" is or is not co-extensive with the flexibility of constitutional criteria, Title VI prohibits non-minorities' exclusion from the participation in and denial of the benefits of federal monies appropriated under the PWEA.

This Court has already clearly recognized the multi-pronged sweep of Title VI as prohibiting more than just discrimination. In *Lau v. Nichols,* 414 U.S. 563 (1974), this Court held that a racially neutral educational program had the effect of depriving the Chinese speaking minority of "a meaningful opportunity to participate in the educational program," had a discriminatory impact, and thus violated Title VI. 414 U.S. at 568. Discriminatory intent was not a prerequisite to finding a statutory violation. On the other hand, as this Court later held, such discriminatory intent was and is necessary to find a *constitutional* violation. *Washington v. Davis,* 426 U.S. 229, 249 (1976) (discriminatory impact not enough to find a constitutional violation). This dichotomy plainly establishes that a violation of Title VI may in some cases, require something less than is required to violate the more stringent standards of the Fourteenth Amendment.

The distinction was not overlooked in *Bakke.* Recognizing that a plain reading of *Washington* and *Lau* underscores the broader sweep of Title VI vis-à-vis the Constitution, the Brennan Group, at least implicitly, recognized the incongruity of its

finding of coextensiveness, 438 U.S. at 352-53, and did in fact sanction the special admissions program under pure Title VI standards without reference to the constitutional arguments. *Id.*[10] Accordingly, it is submitted that the *Bakke* Court left open the question of the scope of the constitutional dictates with respect to other facets of Title VI.

The legislative history of the Civil Rights Act of 1964 similarly supports such finding. Although the legislative history makes it apparent that the immediate object of Title VI was to prevent federal funding of segregated facilities,[11] it is equally apparent that its proponents intended a statutory framework which transcended constitutional mandates and included that which is morally just.[12] Senator Pastore, speaking of the basic purpose of VI, concluded that "[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind." 110 Cong. Rec. 7055 (1964). Thus, notwithstanding the constitutional mandates for the distribution of federal funds, it is clear that the proponents of Title VI

---

10. Mr. Justice Powell also discussed *Lau* but not the facet relating to statutory as opposed to constitutional standards 438 U.S. at 303-04.

11. *See, e.g.,* 110 Cong. Rec. 1521 (1964) (remarks of Rep. Allen); *id.* at 6544 (remarks of Sen. Humphrey).

12. "Title VI is sound; it is morally right; it is legally right; it is constitutionally right." 110 Cong. Rec. 7055 (1964) (Remarks of Sen. Pastore). Senator Humphrey similarly explained Title VI as expressing principles of both constitutional *and* moral understanding.

> "The purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which Title VI seeks to end, are unconstitutional. . . . *In all cases,* such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, Title VI is simply designed to insure that federal funds are spent in accordance with the Constitution *and* the moral sense of the Nation." 110 Cong. Rec. 6544 (emphasis added).

intended that statute to provide for the flow of such funds so that no person, regardless of his race, should be denied the opportunity to compete for a benefit. In light of this Courts' decisions in *Lau* and *Washington,* and the strong supporting legislative history of Title VI, this Court should conclude that the language of Title VI still bars the exclusion from participation or denial of benefits of federally funded programs on racial grounds without reference to the Constitution.

Additionally, the term "discrimination" as used in §601 must be given its ordinary meaning as that term was defined in 1964. It is respectfully submitted that any finding of the *Bakke* Court to the contrary should be re-examined.

The legislative history of the Civil Rights Act of 1964, and particularly of Title VI, reinforces the plain meaning of the statute and confirms that Congress intended to accord all, blacks and whites alike, equal access to federally funded projects. The issue of the definition of the term "discrimination" was first raised by the opponents of Title VI who feared that "discrimination" would be read as mandating racial quotas and racial balance in all transactions. *See, e.g.* 110 Cong. Rec. 1619 (remarks of Rep. Abernathy); *id.*, at 5611-5613 (remarks of Sen. Ervin); *id.*, at 9083 (remarks of Sen. Gore). Senator Humphrey, however, speaking for the proponents of the legislation, gave assurance that Title VI would be "colorblind" in its application.

> "[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .
>
> The answer to this question is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everybody else." 110 Cong. Rec. 5864 (Remarks of Sen. Humphrey).
>
> "[I]f we started to treat Americans as Americans, not as fat ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." 110 Cong. Rec. 5866 (Remarks of Sen. Humphrey).[13]

The remarks of Senator Humphrey set the obvious interpretive standard for the Act, and clearly show that "discrimination" of any manner was proscribed by the proponents of Title VI.

Further, it is an elementary cannon of construction that legislative and judicial statements must be considered in the historical context in which they were made. *Afroyim v. Rusk,* 387 U.S. 253, 261 (1967). There is no doubt that the reality of discrimination against Negroes provided the impetus for the passage of Title VI. But this fact by nc means supports the proposition that Congress intended to permit the distribution of public funds so as to discriminate against non-blacks.

---

13. This view was later reiterated in the "Bipartisan Civil Rights Newsletter No. 9" distributed to the Senate on March 19, 1964 by the supporters of the Civil Rights Act:

> "3. Defining discrimination: Critics of the Civil Rights Bill have charged that the word 'discrimination' is left undefined in the bill and, therefore, the door is open for interpretation of this term according to 'whim or caprice. . . .'
>
> There is no sound basis for uncertainty about the meaning of discrimination in the civil rights bill. It means a distinction in treatment given to different individuals because of their different race, religion, or national origin." 110 Cong. Rec. 7477 (1964).

At a time when Congress was not directly concerned with the problems of "reverse discrimination" or "affirmative action" programs,[14] the legislative history reinforces a reading of Title VI that *all* should have access to participation in federally funded programs.

Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

> "What [Title VI] provides is already the law of the land, which the courts have upheld repeatedly. The Courts have held that when citizens pay taxes which go into the Treasury of the United States, and pay taxes, not on the basis of race, but on the basis of citizenship, they shall receive the benefit of the money that is spent, *not on the basis of race, but on the basis of citizenship,* and there shall be no discrimination or discriminatory use of such funds." 110 Cong. Rec. 5865. (emphasis added)

Similarly, Representative Celler, the House floor manager for the entire Civil Rights Act observed:

> "[Title VI] would require that each Federal agency which extends financial assistance of the type covered by Title VI must establish

14. In fact, in discussing Title VI, Senator Moss concluded:

> ". . . we do not seek to create extraordinary rights or special privileges, for S. 1752 is in fact what it is in name — a Civil Rights Act. And its only purpose is to assure that those just claims which derive from membership in this society will no longer be denied on account of race, color, or national origin. There is no intent here — and no possibility — that a Negro will be given special preference. . . ." 110 Cong. Rec. 6749 (1964).

> nondiscriminatory standards of general application. *This means that it cannot apply one standard of conduct to one person and a different standard of conduct to another."* 110 Cong. Rec. 1517 (1964) (emphasis added).[15]

It is clear that the proponents of Title VI assumed that the Constitution itself was to be "colorblind" in its application. The remarks of Senator Douglas, further support this view. In outlining the principles of the Fourteenth Amendment as they apply to the Civil Rights Act, Senator Douglas concluded:

> "This epochmaking amendment established a number of fundamental principles, of which full significance is only now being appreciated.
>
> 1. . . .
>
> 2. No distinctions were to be made as to the various types of citizenship. There were to be no second class or third class citizens. *All were to be first class citizens on equal terms with all others.*
>
> 3. . . .
>
> 4. *All citizens — white or black, rich or poor —* were therefore entitled to 'equal rights and privileges under the law', nor was any State to deprive them of the 'equal protection of the laws,'

15. *See also,* 110 Cong. Rec. 6047 (remarks of Sen. Pastore) (under Title VI it is not "permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin."); 110 Cong. Rec. 1629 (remarks of Rep. Halpern). Similarly, Senator Muskie concluded in a lengthy defense of the entire act: "Every American citizen has the right to equal treatment — not favored treatment, not complete individual equality — just equal treatment." 110 Cong. Rec. 12614 (1964).

> nor could a State take a man's 'life, liberty, or property without due process of law.'
>
> 5. All this constituted an explicit obligation on the part of the State governments — and their subordinate local governments — *to refrain from any action which might deny to some rights and privileges granted to others. . . .*" 110 Cong. Rec. 6812 (1964) (emphasis added)[16]

When interpreting Title VI, this Court should not consider whether the 1964 Congress was mistaken in its view of the limits of the Fourteenth Amendment. Rather, it is incumbent on this Court "to construe the statute in light of the impressions under which the 88th Congress did in fact act." *Moor v. County of Alameda,* 411 U.S. 693, 709 (1973).

Nothing in the legislative history justifies the conclusion that the broad language of Title VI should not be given its natural meaning. In fact, the supporters of Title VI urged that:

> "Where federal funds are made available in order to provide jobs, it would be unconscionable to permit discrimination in the availability of these jobs." 110 Cong. Rec. 6545 (1964) (remarks of Senator Humphrey).

There can be no doubt that Congress responded to the problem of federal funding of segregated facilities by extending a broad prohibition against the exclusion of *any* individual from a federally funded project on the grounds of race.

In direct contrast to the legislative policy of non-discrimination embodied in Title VI is Section 103(f)(2) of the

16. *See also, e.g.,* 110 Cong. Rec. 5253 (remarks of Sen. Humphrey); and *id.,* at 7102 (remarks of Sen. Javits).

PWEA which is totally devoid of any legislative history, policy or goal, except the brief remarks of its sponsor, Representative Mitchell.[17]

As recognized by the court in *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 967-68 (C.D. Cal. 1977), rules of construction in cases involving conflicting statutes are not helpful where, as here, the court must go beyond that conflict and ascertain the purpose underlying the conflicting enactments to better determine which of the two will prevail. *See e.g., Fanning v. United Fruit Co.,* 355 F.2d 147, 149 (4th Cir. 1966).

When the overriding public interest is demonstrably clear and a prior general statute sets forth the true constitutional mandate, and the latter more particularized statute is less conducive to the public welfare, then the public good must control and the general statute takes precedence over and invalidates the specific statute. *Associated General Contractors of California, supra,* 441 F. Supp. at 968.

On this basis alone, Section 103(f)(2) of the PWEA should be held invalid as violating the overriding Congressional policy of Title VI of the Civil Rights Act of 1964.

It is difficult to believe that Title VI has been repealed or suspended by Congress, in whole or in part, by the enactment of the MBE provision.[18] In the absence of clear legislative intent to

17. The scant remarks of Representative Mitchell have been characterized by one court as being far from legislative history and merely "the debate rhetoric of a partisan who sponsored the amendment." *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. at 969. As further pointed out in *Associated General Contractors,* "the legislative history [of the PWE Act] includes no mention of the MBE provisions. . . ." 441 F. Supp. at 965.

18. On the contrary, the regulations direct compliance with Title VI. *See,* 13 C.F.R. §317.35(a)(2) (1977).

the contrary, those broad purposes set forth in Title VI must remain the viable and continued expression of Congressional policy. The applicability of the Civil Rights Act clearly indicates that the MBE provision in the instant statute must be struck down because, most obviously, it cannot co-exist with the applicable provision of Title VI.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the judgment of the District Court, as well as the affirmance by the Second Circuit Court of Appeals be reversed in all respects, and that plaintiffs' complaint be reinstated, and the relief sought therein granted, together with the costs and disbursements of this appeal, and such other and further relief as may be just and proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1007

H. EARL FULLILOVE, *et al.*,
Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

BRIEF FOR PETITIONER, GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., THE NEW YORK STATE BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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IN THE

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No. 78-1007

H. EARL FULLILOVE, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

BRIEF FOR PETITIONER GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., THE NEW YORK STATE BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 23a)[1] is reported at 584 F.2d 600 (2d Cir. 1978). The opinion of the United States District Court for the Southern District of New York (Werker, J.) (Pet. App. 1a) is reported at 443 F.Supp. 253 (S.D.N.Y. 1977).

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[1] "Pet. App." refers to the appendix attached to Petitioners' Petition for Writ of Certiorari filed December 21, 1978.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on September 22, 1978. The petition for writ of certiorari was filed on December 21, 1978 and granted on May 21, 1979. The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether Sec. 103(f)(2) of the Public Works Employment Act of 1977, which provides for a 10 percent quota for minority business enterprises, violates the Due Process Clause of the Fifth Amendment.

Whether Sec. 103(f)(2) of the Public Works Employment Act of 1977, which provides for a 10 percent quota for minority business enterprises, violates Title VI of the Civil Rights Act of 1964.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATUTES INVOLVED

Sec. 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, 42 U.S.C. 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT

On July 22, 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, [hereinafter the LPWA)]. The LPWA provided $2,000,000,000 of federal funds to state and local entities for the purpose of alleviating national unemployment. On May 13, 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 [hereinafter PWEA], which amended the LPWA and appropriated an additional $4 billion for similar projects. The PWEA contained Sec. 103(f)(2), the minority business enterprise provision [hereinafter MBE provision], which required at least a 10 percent set aside [hereinafter quota] for minority business enterprises of the dollar value of each grant. 42 U.S.C. § 6705 (f)(2).

The Secretary of Commerce administers the PWEA through the Economic Development Administration [hereinafter EDA] which distributes program funds to state and local applicants for the construction of public works projects. Under Section 103(e)(1) of the PWEA, state and local grantees are required to contract with private contractors for the construction of these public works projects, 42 U.S.C. § 6705(e)(1). On May 27, 1977, the Secretary of Commerce issued regulations implementing the MBE provision of the PWEA, 42 Fed. Reg. 27,434 (1977).[4] There regulations require that at least 10 percent of each grant made under the PWEA must be expended for contracts with and/or supplies from minority business enterprises. 13 C.F.R. 317.19(b)(1).

In August of 1977, EDA issued *Guidelines for 10 Percent Minority Business Participation in LPW Grants.* Under these guidelines, the MBE requirement could be met in a number of ways, depending upon whether the particular project was administered through a single prime contract involving subcontracts and/or substantial supply contracts, more than one prime contract, simple contracts, or a combination of prime and simple contracts. *See* Respondent's Brief, Exhibit 22e-37e, *Fullilove* v. *Kreps,* 584 F.2d 600 (2d Cir. 1978), *cert. granted* May 21, 1979.

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[4] The regulations provide:

(1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

(2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

13 C.F.R. 317.19(b) (1977).

The City of New York and the State of New York have received grants under the PWEA to fund various municipal projects. Contracts under these projects have been let in accordance with the MBE provision as implemented by EDA regulations and guidelines. Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated General Contractors of America, Inc., is a contractor association whose members perform contracting work on construction projects, including projects let by the State of New York and the City of New York.* The other Petitioners are comprised of various individuals and contractor associations engaged in similar type of work as Petitioner.[5]

On November 30, 1977, Petitioners filed this action in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief. Petitioners contended that Sec. 103(f)(2), which provides for a 10 percent quota for minority business enterprises, violated the Fifth and Fourteenth Amendments, the Reconstruction Civil Rights Statutes (42 U.S.C. §§ 1981, 1983, and 1985) and Title VI and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, 2000e). Petitioners sought a declaratory judgment that the Sec. 103(f)(2) was contrary to statute and unconstitutional. Petitioners also sought to enjoin the Secretary of Commerce and the state and local entities that were grantees, having receiving funds under the Act, from enforcing Sec. 103(f)(2) of the MBE provision.

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* See Appendix B.A

[5] These Petitioners are also jointly filing a brief in this case.

After denying Petitioners' motion for a temporary restraining order, the District Court consolidated Petitioners' application for preliminary injunction with a trial on the merits. Thereafter, the District Court issued an opinion which upheld the constitutionality and legality of Sec. 103(f)(2), denied all requests for relief and dismissed the complaint. *Fullilove* v. *Kreps,* 443 F.Supp. 253 (S.D.N.Y. 1977), (Pet. App. 1a-22a).

The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and held that Sec. 103(f)(2) did not violate the Fifth Amendment's Due Process Clause. *Fullilove* v. *Kreps,* 584 F.2d 600 (2d Cir. 1978) (Pet. App. 23a-41a). The Court of Appeals ruled that under the most exacting standard, the MBE provision passed constitutional muster. *Id.* at 603, (Pet. App. 28a). It found that "... the set-aside was intended to remedy past discrimination," and that "the [District Court] judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record. . . ." *Id.* at 604, 606, (Pet. App. 32a, 36a). The Court of Appeals in a footnote states that a majority of this Court has held that Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment, citing *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978). *Id.* at 608, n.15, (Pet. App. 39a). Inasmuch as it finds the set aside provision constitutional, the Court of Appeals implies that the MBE provision does not violate Title VI.

SUMMARY OF ARGUMENT

The Fifth Amendment's Due Process Clause guarantees persons equal protection of federal laws. Traditional equal protection analysis is used in examining whether a statute violates the Due Process Clause. Where a statute contains a race-based classification, strict scrutiny analysis is required. Sec. 103(f)(2), the MBE provision of the PWEA, which establishes a 10 percent quota for each grant under the PWEA, is clearly a race-based classification and thus should be examined with strict scrutiny by this Court.

The MBE provision fails the strict scrutiny test for many reasons. First, Respondent [hereinafter the Government] has not shown a compelling governmental interest for the MBE provision. Specifically, the MBE provision is not a remedy for specific past discriminatory acts because none have been shown. Further, there have been no legislative findings by the Congress of discrimination by contractors or the construction industry generally. Also, the MBE provision is not precisely tailored to serve a compelling governmental interest. In addition, the MBE provision is not the less drastic means of achieving the Government's claimed objective. It has not been shown that the MBE provision is an effective means of arriving at its purported objective. Further, there exist or have been proposed other alternatives which are less drastic than the MBE provision which should have been considered by the Congress.

Moreover, Petitioner submits that under any test the MBE provision violates the Due Process Clause of the Fifth Amendment. Under the Due Process Clause, the MBE provision, a race-based classification, which

imposes disadvantages upon persons who bear no responsibility for whatever harm the beneficiaries of the MBE provision are thought to have suffered, cannot be justified. The MBE provision also violates Title VI of the Civil Rights Act, as amended.

ARGUMENT

I.

Sec. 103(f)(2) of the PWEA Violates the Due Process Clause of the Fifth Amendment of the Constitution

A. Sec. 103(f)(2) of the PWEA is subject to strict scrutiny [4]

This Court has held that the principles of the Fourteenth Amendment are embodied in the Due Process Clause of the Fifth Amendment. *Washington* v. *Davis,* 426 U.S. 229, 239 (1976); *Johnson* v. *Robison,* 415 U.S. 361, 364 n.4, (1974); *Frontiero* v. *Richardson,* 411 U.S. 677, 697 (1973). The type of analysis required is the same for both amendments. *See Buckley* v. *Valeo,* 424 U.S. 1, 93 (1976). Under modern equal protection standards, classifications based on "race" are suspect and therefore trigger the strict scrutiny standard. *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). In *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 291 (1978) [hereinafter *Bakke*], Justice Powell stated that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." [5]

[4] The decision of this Court in *United Steelworkers* v. *Weber,* —— U.S. ——, Nos. 78-432, 78-435, and 78-436 (June 27, 1979) [hereinafter *Weber*], is inapposite to the instant case. The *Weber* case did not involve a constitutional challenge under the Fifth or the Fourteenth Amendment inasmuch as there was no governmental action.

Sec. 103(f)(2) of the PWEA provides that at least 10 percent of each grant made under the Act must be to minority business enterprises. 42 U.S.C. § 6705(f)(2). Under this section, a "minority business enterprise" is a business at least 50 percent of which is owned by minority group members or 51 percent of the stock is owned by minority group members in the case of a publicly owned business.[6] Minority group members are defined in this section as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." The MBE provision is an explicitly race-based condition on the receipt of federal funds under the PWEA.[7] As a classification based on race, it is inherently suspect and subject to strict scrutiny by this Court.[8]

[5] According to Justice Powell, racial and ethnic classifications are subject to stringent examination without regard to the additional characteristics of discreteness and insularity. *Bakke, supra* at 291.

[6] It is well established that corporations are persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment and entitled to its protection. *First National Bank of Boston* v. *Bellotte,* 435 U.S. 765 (1978); *Safeguard Mutual Insurance Co.* v. *Miller,* 472 F.2d 732 (3d Cir. 1973); *Township of River Vale* v. *Town of Orangetown,* 403 F.2d 684 (2d Cir. 1968). Likewise, corporations are entitled to due process protections under the Fifth Amendment of the Constitution. *Wright Farms Construction, Inc.* v. *Kreps,* 444 F.Supp. 1023 (D. Vt. 1977); *Blawis* v. *Bolin,* 358 F.Supp. 349 (D. Ariz. 1973).

[7] The Secretary of Commerce has admitted that Congress, in enacting the MBE provision, created an explicitly race-based condition on the receipt of federal funds. *Fullilove* v. *Kreps,* 584 F.2d 600, 602 (2d Cir. 1978) (Pet. App. 28a).

[8] This Court also utilizes the strict scrutiny standard in ". . . reviewing legislative judgments that interfere with fundamental con-

The strict scrutiny standard involves a two-prong standard of review. First, the provision must serve a compelling governmental interest. Second, it can be justified only, if it is the less drastic means of achieving the objective.* *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16-17 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 337, 343 (1972); *Bakke, supra* at 299 (Powell, J.).

B. The 10 Percent MBE Provision does not serve a compelling governmental interest

This Court has recognized that there is a compelling governmental interest for racial classification preferences only where minorities were victims of discrimination by a particular employer.[10] Also, as recognized by Justice Powell in *Bakke, supra* at 301, such pref-

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stitutional rights. . . ." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16 (1973), and cases cited therein. In *Bakke, supra,* at 357, Justice Brennan in an opinion joined by Justices Marshall, White, and Blackmun [hereinafter Brennan, J.] stated: "a government practice or statute which restricts fundamental rights, . . . is to be subjected to strict scrutiny and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." (footnote omitted). Justice Brennan did not employ the strict scrutiny analysis in reviewing the Davis two-track admissions system, finding neither a suspect class nor a fundamental right involved. *Id.* In contrast, the 10 percent MBE provision in the PWEA which absolutely deprives non-minority businesses from participating in at least 10 percent of each grant, infringes on their right to work, which is a fundamental right. *Slaughter House Cases,* 16 Wall 36 (1872). *See also Truax* v. *Raich,* 239 U.S. 33, 41 (1915). Thus, this is an additional reason for examining the 10 percent MBE provision under the strict scrutiny standard.

* The Court of Appeals erred in not finding that the 10 percent MBE provision, a clearly race-based classification, must be examined under the strict scrutiny standard.

[10] In *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747 (1976), this Court approved a retroactive award of seniority to a class of

erences have been upheld where a legislative or administrative body made determinations of past discrimination by the industries affected.[11] In *Bakke, supra* at 307, Justice Powell stated:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, *e.g., Teamsters* v. *United States,* 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* v. *Carey,* 430 U.S. at 155-156; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308 (1966).

Justice Powell found that there was no compelling state interest for the race-based classification because ". . . there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts." *Id.* at 305. An analysis of the legislative history does not indicate Congress' purpose in passage of Sec. 103(f)(2) was to remedy past discrimination or that Congress made detailed findings of past discrimination that would justify the preferential treatment mandated in Sec. 103(f)(2).

The MBE provision was not considered in committee in either the Senate or the House.[12] The MBE provi-

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Black truck drivers who had been identifiable victims of discrimination, not just by society at large but by the employer in that case.

[11] *Contractors Ass'n of E. Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971).

[12] See H.R. Rep. No. 20, 95th Cong. 1st Sess. (1977); S. Rep. No. 95-38, 95th Cong. 1st Sess; *Fullilove* v. *Kreps,* 584 F.2d at 605 (Pet. App. 34a).

sion originated as an amendment offered on the House floor by Representative Parren Mitchell during debate on the PWEA. 123 Cong. Rec. H. 1436 (daily ed. Feb. 24, 1977). The House passed H.R. 11 containing Representative Mitchell's amendment, after amending it to give the Secretary of Commerce discretion to grant waivers. 123 Cong. Rec. H. 1441, 1462 (daily ed. Feb. 24, 1977). Senator Edward Brooke moved to amend the Senate version of the PWEA to include a similar MBE provision.[13] 123 Cong. Rec. S. 3910 (daily ed. March 10, 1977). The Senate passed H.R. 11 on March 10, 1977, after amending it and inserting in lieu thereof S. 427, which contained Senator Brooke's amendment. 123 Cong. Rec. 3927-29. The Conference Committee on the PWEA agreed to the House version of the amendment. The Conference Committee's bill was agreed to by the Senate and the House.[14] 123 Cong. Rec. S. 6755-6757 (daily ed. April 29, 1977); 123 Cong. Rec. H. 3920-3935 (daily ed. May 3, 1977).

Thus, there is little legislative history relating to the MBE provision. The floor debates, in both the Senate (123 Cong. Rec. S. 3910) and the House (123 Cong. Rec. H. 1436-1441), do not mention present or past discrimination, nor the fact that the 10 percent MBE requirement was intended to remedy such discrimination. There was no "detailed legislative consideration of the various indicia of previous constitutional or statutory violations" by the Congress and

[13] The Brooke amendment differed from the Mitchell amendment in that it would have prohibited defunding of a project for failure to comply with the 10 percent set aside in areas where the minority population was less than 5 percent. 123 Cong. Rec. S. 3910.

[14] The PWEA, P.L. 95-28, was signed into law on May 3, 1977.

further the Congress did not make "findings with respect . . . to identified past discrimination" in the construction industry. *Bakke, supra,* at 302, n.41, (Powell, J.). The legislative history indicates that the purpose of the bill was to simply give minority business enterprises, in the words of Rep. Mitchell, its sponsor, "a piece of the action." 123 Cong. Rec. H. 1436. The remarks made by other Representatives also do not indicate that there were findings of identified discrimination and a determination that the proper remedy was a 10 percent quota. 123 Cong. Rec. H. 1436-1441 (daily ed. February 24, 1977).[15]

The Court of Appeals found that the quota was intended to remedy past discrimination. *Fullilove* v. *Kreps,* 584 F.2d at 604 (Pet. App. 32a). It also ruled that the record support the District Court's finding that Congress acted upon sufficient evidence of past discrimination. *Id.* at 606 (Pet. App. 36a) The Court of Appeals does not address the specific issue of "who discriminated" against minority business enterprises. It is clear that the District Court could make no specific finding that "contractors" discriminated against minority business enterprises because the Congress did not consider this issue.

The District Court cited a Department of Commerce Minority Business Opportunity Handbook (Aug. 1976) and the Report of the United States Commission on Civil Rights, "Minorities and Women as Govern-

[15] In this regard, it should be noted that this Court has held that such remarks made on the floor in the course of legislative debates are not to be treated as persuasive or expressions of legislative intention. *United States* v. *United Mine Workers,* 330 U.S. 258, 276-277 (1947); *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 125 (1942); *McCaughan* v. *Hershey Chocolate Co.,* 283 U.S. 488, 493-494 (1930) and cases cited therein.

ment Contractors" May, 1975 [hereafter Civil Rights Report] as indicating that minority business enterprises receiving government contracts are few in number. *Fullilove* v. *Kreps*, 443 F.Supp. 253, 258-259 (S.D. N.Y. 1977), (Pet. App. 11a-12a). However, it does not find that these sources identify discrimination as a reason for the small number of minority business enterprises.[16] In fact, the Civil Rights Report, one of the sources cited by the District Court, does not list discrimination as an obstacle to minority business enterprise participation in federal procurement programs.[17] Civil Rights Report at 24. Further, the District Court did not determine that the Congress examined or even was aware of these documents when it passed the MBE provision.[18]

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[16] In *Montana Contractors' Ass'n* v. *Secretary of Commerce*, 460 F.Supp. 1174, 1177-1178, (D.Mont. 1978), the District Court found that the racial preference in the MBE provision was unjustifiable because there were no legislative findings of discrimination. In this regard the District Court stated:

> "If it be assumed that the debates on the floor of the House and the report of government agencies not made in connection with the MBE requirement . . . are findings, (footnote omitted), they do no more than find that minority races do not participate in equal proportion in government bidding and state the conclusion this is because of discrimination."

[17] Additionally, a Report by the Comptroller General of the United States, dated January 16, 1979, lists several problems which minority business enterprises encounter in participation in federal procurement programs but does not include discrimination among them.

[18] The District Court also references a report of the House Committee on Small Business, H.R. Rep. No. 1791, 94th Cong. 2d Sess. 124 (1977) as support for its determination that the Congress made findings of discrimination. *Fullilove* v. *Kreps*, 443 F. Supp. at 259, (Pet. App. 13a). While this Report makes a couple of generalized statements as to problems that minorities face in the construction

The government has not met its heavy burden of justification to show that there were findings of identified discrimination made by the Congress. *Bakke, supra* at 2754 (Powell, J.) and cases cited therein.[19] Thus, the government has not shown a compelling interest for the 10 percent MBE interest which is a preferential classification which denies non-minority business enterprises the opportunity to obtain 10 percent of each grant under the PWEA.[20]

Under the strict scrutiny standard, a race-based classification must be structured with precision and narrowly tailored to serve a compelling governmental interest. *See San Antonio Independent School District* v. *Rodriguez, supra* at 16-17; *Dunn* v. *Blumstein, supra*

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industry, it does not find that contractors presently or in the past have discriminated against minority business enterprises. Furthermore, this report was from a previous Congress and was not authored by the Committee which reported the PWEA. There is no indication that the Congress ever examined this report in its consideration of the MBE provision.

[19] With respect to the need for findings of discrimination, in *Bakke, supra* at 308-309 Justice Powell stated:

> "Without such findings . . . it cannot be said that the government has any greater interest in helping one interest than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

[20] The MBE provision also denies procedural due process to non-minority business enterprises in violation of the Fifth Amendment. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976). In *Hampton* v. *Mow Sun Wong, supra* at 103, this Court found that, in the case of a rule which "deprives a discrete class of persons of an interest in liberty on a wholesale basis" . . . "such a deprivation must be accompanied by due process." In the instant case, the 10 percent MBE provision completely excludes non-minority business enterprises from participation in 10 percent of the grants awarded under the PWEA. This total exclusion from eligibility to compete for 10 percent of the grants made under the PWEA

at 343, and cases cited therein. In *Bakke, supra* at 299, Justice Powell stated:

> When they [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948) . . ; *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351 (1938). . . .

As noted above, the legislative history indicates that very little consideration was given to precisely tailoring the statute. Minority Group Members are simply defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Sec. 103(f)(2) of PWEA, 42 U.S.C. 6705(f)(2). There is no further discussion in the legis-

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"is of sufficient significance to be characterized as a deprivation of an interest in liberty." *Id.* Under the standard set forth in *Hampton* v. *Mow Sun Wong, supra* at 104

> When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.

In the instant case, the Government asserts that the purpose of the statute was to remedy the adverse effects of past and present discrimination against minority business enterprises. As discussed above (pages 10-15, *supra*), the legislative history of the 10 percent MBE provision is devoid of legislative findings as to the purposes and interests to be served by the provision. Furthermore, Petitioner submits that the interest asserted by the Government as justification for this provision is not rationally served by this provision. There is no indication that this provision will achieve that objective. *See* page 19, *infra*. Thus, the enactment of the 10 percent MBE provision denies procedural due process to non-minority business enterprises in violation of the Fifth Amendment.

lative history as to the definition of individuals targeted to receive a benefit under this provision. For example, neither the statute nor the legislative history provide guidance as to whether a person who is a part "Negro" is eligible, or whether "Spanish-speaking" persons eligible to receive a benefit include persons of Spanish ancestry. It should also be noted that the Congress did not "precisely" determine that each of the different minorities given favored treatment under the MBE provision had in fact been victims of discrimination in the construction industry.[21] Also, as implied by the Government, if the aim of the statute is to open business opportunities to those who have previously been foreclosed from them, it is difficult to understand why no consideration was given to according preferential treatment on the basis of whether persons are socially and economically disadvantaged rather than solely on the basis of race or national origin.

Neither the statute itself nor the legislative history indicate that Congress structured with precision and narrowly tailored the MBE provision to achieve its purported objective. Thus, the 10 percent MBE provision is not precisely tailored to serve a compelling governmental interest and therefore does not meet the first tier of the strict scrutiny test set forth by this Court in *San Antonio Independent School District* v. *Rodriguez, supra* at 16-18.

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[21] In *Montana Contractors Ass'n, supra* at 1178, the District Court recognized this failure of the Congress to precisely tailor the statute, stating: "They make no distinction between races and there are no findings justifying an all-inclusive preference for all members of a race regardless of the degree of dilution of blood."

C. The 10 Percent MBE Provision is not the less drastic means of effectuating its objective

As noted above, under the strict scrutiny standard, even if a statute serves a compelling governmental interest, it may only be justified if the Government has selected "the less drastic means for effectuating its objectives." *San Antonio* v. *Independent School District* v. *Rodriguez, supra,* at 17. In *Dunn* v. *Blumstein, supra* at 343, this Court stated: "And if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all it must choose 'less drastic means'." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960)." In *Bakke, supra,* at 308, Justice Powell noted it is necessary to assure remedial action "will work the least harm possible to other innocent persons competing for the benefit." [22]

The Court of Appeals completely disregards this second part of the strict scrutiny test. *Fullilove* v. *Kreps,* 584 F.2d at 606, (Pet. App. 36a).[23] Petitioner submits that the 10 percent MBE provision does not withstand

[22] In *Bakke, supra* at 357 (Brennan J.), Justice Brennan noted that under the strict scrutiny test a statute can be justified only if it serves a compelling government interest and is shown to be the less restrictive alternative.

[23] Instead, the Court of Appeals considers whether the bounds of fundamental fairness have been exceeded, citing Justice Powell's concurring and dissenting opinion in *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 784-786 (1976). In this opinion, Justice Powell discusses the limits of affirmative action as a remedy for past discrimination under Title VII. Nowhere in Justice Powell's concurring and dissenting opinion or in the majority opinion in *Franks* v. *Bowman Transp. Co.,* does the Court indicate a departure from the "less drastic means" tier of its strict scrutiny analysis, as set forth in *San Antonio Independent School District* v. *Rodriguez, supra* at 16-17.

this second tier of strict scrutiny review because it is neither an effective means or the less drastic means of achieving its purported objective.

1. *Non-Effective Means*

The Government asserts that the objective behind the MBE provision is to increase the number of minority business enterprises who contract with the federal government.[24] However, it has not been shown that the MBE provision will achieve this purported objective. The 10 percent MBE provision does not address the problems which are the true stumbling blocks to minority business enterprise viability not only to participation in federal contracting, but to participation in the construction industry generally.

The Report of the Comptroller General of the U.S., (Jan. 16, 1979) [hereinafter the GAO Report] indicates that minority business enterprise firms face the following problems: inadequate working capital; difficulty in obtaining bonding; problems with federal paperwork and problems with the competitive bid procedure. *Id.* at ii, iii 16, 32. These same problems were found to be impediments to minority business enterprise participation in the Report of the United States Commission on Civil Rights, "Minorities and Women as Government Contractors", May 1975 [hereinafter Civil Rights Report] The Civil Rights Report specifically cited ten problems which minority business enterprises face, including: insufficient working capital; no knowledge of future bidding opportunities

[24] In its brief in the Court of Appeals, the Government characterized the purpose of the MBE provision as "removing barriers preventing MBE's from sharing in federal construction funds." Brief for Defendant-Appellee (Respondent), at 3. *Fullilove* v. *Kreps,* 584 F.2d 600 (2d Cir. 1978) (Pet. App. 28-41a).

or preselection before the formal advertising process; inadequate marketing staff; overbidding; inadequate track record; no understanding of bonding; no understanding of government contracting regulations; preparation of bids and proposals, and inadequate staff.[25] Civil Rights Report at 24.

The GAO Report on the MBE program implemented pursuant to Sec. 103(f)(2) of the PWEA criticizes the program and raised questions as to its effectiveness. The GAO Report indicates that there were serious problems in identifying who is a bona fide minority business enterprise. Some minority business enterprises were established to take advantage of the program with no intent of staying in business after the program lapsed. *Id.* at iii. It was also evident that very often the so called minority owners had little role in management of the firm and were usually fronts for non-minority firms. GAO Report at 25-27. The GAO Report indicates that, in order to comply with the MBE requirement, contractors used suppliers serving no useful commercial function, who were an unnecessary intermediary between the regular suppliers and the prime contractors, existing merely to take advantage of the 10 percent requirement. GAO Report at 26. Another problem occurred with respect to eligibility, where minority subcontracting firms subcontracted out most of the work to non-minority subcontractors. GAO Report at 27.

In fact, as the GAO Report indicates, the MBE provision approach actually encourages the development

[25] As previously noted (see page 14, *supra*), neither the GAO Report nor the Civil Rights Report lists "discrimination" as a problem for minority business enterprises in the construction industry.

of non-bona fide minority business enterprises. The time available for setting up a viable minority business enterprise to take advantage of the minority quota is totally inadequate. The GAO Report evidences that many MBE's would not last beyond the life of the program. Existing minority business enterprises are not helped long term by the mandatory quota, which does little to make them more self-reliant and able to compete on an equal basis with other firms in the open competitive market.

If the goal of the MBE provision was to "develop a viable economic system for minorities in this country" and thereby "reduce survival support programs now paid for by the federal government", as stated by Representative Mitchell, the sponsor of the amendment, then it is necessary to make minority business enterprises stable and competitive. (Remarks of Representative Mitchell, 123 Cong. Rec. H 1436-37, daily ed. February 24, 1977). However, by not assisting minority business enterprises with their basic problems (see pages 19-20, *supra*), but instead simply removing them from the competition, the MBE provision is nothing more than another "support survival program" and neither a means of increasing participation of minority business enterprises in federal procurement nor increasing viability of minority businesses generally in the construction industry.

2. *Not the Less Drastic Means*

The legislative history of the PWEA indicates that Congress did not "select" the MBE provision among other alternatives. It did not consider any means other than the 10 percent MBE provision for accomplishing the purported objective of increasing participation of

minority business enterprises in government contracting. There is a dearth of statements in the legislative history with respect to considerations of alternatives to the quota provision. As previously noted (see page 11, *supra*) there was no committee consideration of the provision in either the House or the Senate. The MBE provision was an amendment offered on the floor in both the Senate and the House. There was no discussion in the floor debate concerning other alternatives. The quota was selected solely as the most obvious, simplistic method of "giving minority business a piece of the action." (Remarks of Representative Mitchell, 123 Cong. Rec., H. 1436, daily ed. Feb. 24, 1977.) No conclusion is possible but that Congress made a purely arbitrary selection both as to the means of bolstering minority participation, i.e., the quota, as well as the specific percentage by which to do so, i.e., a 10 percent allocation.

The 10 percent MBE requirement constitutes a race-based quota which deprives non-minority contractors from participation in at least 10 percent of the PWEA.[26] It is clear that the MBE provision "forces innocent persons . . . to bear the burdens of redressing

[26] The 10 percent MBE requirement also places a grave burden on prime contractors. Specifically, prime contractors must find a minority business enterprise firm with whom to subcontract. The GAO Report indicated that contractors faced great difficulties in finding MBE's. GAO Report at ii. 48 percent of the rural projects and 51 percent of the urban projects had difficulties in finding minority business firms. Further, the guidelines issued by the Economic Development Administration to implement the MBE provision placed a burden on prime contractors by requiring them to help minority firms to obtain bonding or working capital or waive the bonding requirement when feasible. GAO Report at 30.

grievances not of their making."[27] *Bakke, supra* at 298 (Powell, J.). In sum, the 10 percent MBE set aside was an eleventh hour *ad hoc* measure which imposes a heavy burden on non-minority contractors solely on the basis of their race.[28] However, there are numerous other means which presently exist or which have been proposed that accomplish the Government's claimed objective and that most importantly are less constitutionally offensive.

[27] In its more detailed consideration of P.L. 95-507, the Small Business Act Amendments of 1978, 92 Stat. 1757, 15 U.S.C. 683 *et seq.* Congress recently specifically rejected imposition of a subcontracting quota requirement for minority business enterprises and also refused to give a contracting agency the authority to reject a best faith efforts plan submitted by a low bidder, on the ground it is non-responsive. One of the original House versions (H.R. 567) of what became P.L. 95-507 provided for a flat MBE quota requirement. This provision was considered in subcommittee and dropped. There was no flat quota provision in the Committee bill (H.R. 11318). H.Rep.No. 95-949, Select Committee on Small Business, 95th Cong. 2d Sess., 1978. The final version passed by the House established a system whereby agencies or grantees would give "preferences" and "incentives" to bidders with the "best" minority and small business subcontracting plans. The Senate version of this legislation required simply that the apparent low bidder submit a plan reflecting his best faith efforts to contract with small and minority businesses. The Conference Committee adopted the House version with respect to negotiated contracts and the Senate version with respect to competitively bid contracts. H. Rep. No. 85-1714, 95th Cong. 2d Sess., 1978 at 3885-3886. 15 U.S.C. 637(d).

[28] In *Truax* v. *Raich*, 239 U.S. 33, 42-43 (1915), this Court rejected the argument that, because a quota for a preferred class did not totally eliminate employment opportunities for the non-preferred class, it did not violate the Equal Protection Clause.

3. *Less Drastic Means* [29]

a. *Joint Venture*

One less drastic and yet effective means of achieving the Government's claimed objective is to provide for joint ventures between minority and non-minority contractors. A program could be established which encourages contractors to enter into joint ventures with individuals who own minority business enterprises, by providing tax incentives. The joint venture could be on a project basis or for a fixed period of time (hours, months, etc.). The advantage of the joint venture is that it would enable the minority business enterprise entrepreneur to work with the contractor over a period of time in a "partnership-type arrangement." This arrangement would assist minority business enterprise individuals in the development of general management skills, and specific expertise in such areas as finance, labor, bidding procedures, marketing, and bonding, which as previously indicated (see pages 19-20, *supra*) are some of the real problems which minority business enterprises face.

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[29] In setting forth the following alternatives which exist to the MBE provision, Petitioner intends solely to point out to this Court that there are less drastic means to achieve its Government claimed objective, which should have been considered by the Congress. It does not endorse any of the alternatives set forth herein nor does it intend to indicate that the list is exclusive. Additionally, although it discusses the alternatives for the most part in terms of addressing the needs of minority individuals who own businesses, i.e. those covered in Section 103(f)(2), Petitioner submits that all programs discussed *infra* would be more effective and less onerous from a constitutional viewpoint if they were structured to address the needs of socially and economically disadvantaged individuals who own businesses.

Joint ventures allow for flexibility. The level of participation in the joint venture would hinge on the minority individual's experience with participation on a 90/10, 80/20 or greater basis. If the joint venture extended over a substantial period of time, a greater share of the jont venture could be given to the minority individual as he or she acquired more experience. The joint venture concept would serve to improve the skills of minority business individuals and thereby provide greater guarantees that they will be able to compete not only for federal contracts but for contracts generally in the construction market place. It also does not deprive non-minorities of their right to competitively bid on a portion of the grant, and thus is a less drastic means of achieving the Government's claimed objective.

b. *Technical, Financial, and Educational Assistance Programs*

Another less drastic means of achieving the Government's claimed objective is to redirect the efforts of government agencies to provide for greater availability of "realistic programs and services in the areas of managerial, technical, and financial assistance" [30] and educational assistance to minority business enterprises. Such programs could provide minority business enterprises with the assistance they need to achieve stability and self-reliance, which would enable them to compete effectively in the competitive market for government contracts.

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[30] Testimony of Associated General Contractors of America, Inc., on H.R. 567 and H.R. 2379 before the Subcommittee on Minority Business Enterprise and General Oversight of the House Committee on Small Business, September 27, 1977.

Technical Services

Technical services could include assistance in: taking steps to become prequalified or licensed as a contractor, subcontractor, vendor or supplier; understanding bonding requirements; and understanding how to obtain loans and working capital, or any other matters related to the construction industry. These services could take the form of either a toll-free number which would furnish information on bidding solicitation and answer questions or in-field assistance by support personnel who would visit minority business owners at their place of business to provide technical services. Another support service would be to compile a directory of interested MBE's and distribute it to prime contractors.[31]

Financial Assistance

In all reported studies on minority business a problem always cited is obtaining working capital to get the business off the ground and to make it grow. Financial assistance programs, either individually or collectively with other programs, would greatly assist in increasing the number of viable minority business enterprises. There is no end to the type of financial assistance that can be provided. However, one program could be direct loans similar to those which the Department of Health, Education and Welfare provides to students at a reduced rate and payable at a later period of time.[32] Such a program applied to in-

[31] Since May 1977, the Montana Contractors Association, Inc., Helena, Montana, through a supportive service contract with the State of Montana, has operated an MBE program which provides these types of technical services.

[32] Title IV, Part B, Higher Education Act of 1965 (P.L. 89-329), 20 U.S.C. 1071-1087.

dividuals owning or operating minority business enterprises could furnish needed capital at an extremely low rate which could be payable at a later time at a sliding scale of interest, thereby not placing an undue burden on the enterprise just as it is becoming viable.

Educational Training

Many individuals who are socially and economically disadvantaged would perhaps like to get into a business of their own but cannot afford the money to abandon current employment to attend school and acquire the necessary skills. Thus, there exists a gap that could be filled by a program similar to that used for veterans to allow them certain direct educational grants to get them into the main stream to make up for lost time. Additionally, money could be channeled to the universities to establish work-study progras which would assist individuals who own or operate minority business enterprises to acquire skills needed to effectively operate a business by learning and applying these skills in a realistic business situation.[33]

c. *Assistance Through Trained Workers*

One of the greatest sources of training for persons entering into the business market for the first time is to learn from the experience of those already there or who have been there. As noted above, one program

[33] Programs such as these could be modeled after Associated General Contractors of America, Inc.'s Education and Research Foundation Programs which acquaint individuals in colleges with the practical aspects of the construction industry. Throughout each school year, AGC Education and Research Foundation sponsors various programs in order to acquaint students at numerous universities about careers in the construction industry. The curriculum for these programs include the following: brick laying; commercial carpentry; cement masonery, and construction craftsmen.

that can be considered to utilize this expertise is that of a joint venture. Another type of program which could be established with minimal financial assistance from the government would be to establish a "pool" of trained individuals, e.g. business executives, familiar with the construction industry, who would be loaned to minority business enterprises. These executives could provide training on a short-term basis similar to what is done on a minor scale in Junior Achievement.[34] Another source of expertise would be the utilization of retired personnel who would be willing to share with "would be" minority entrepreneurs the knowledge and experience gained from their prior employment. Another method of learning from experienced individuals would be to establish an internship program to allow individuals who own or wish to own minority business enterprises to spend time (six months/one year) with a "host contractor." The purpose of the internship would be to allow the intern to acquire experience in business administration, construction management, estimation, bidding process, bonding, and banking; and thereby as a result be able to operate viable minority business enterprises.

d. *Bonding*

A major difficulty of any enterprise entering into the construction market is obtaining bonding. Almost all construction projects, particularly those involving the government, require contractors to post bonds covering the completion of work and payments to their employees for work performed. For an existing viable contractor, this presents no real problem. However, where a person is entering the market, he faces the possibility that many bonding companies will not provide a bond at any price or are only willing to provide a bond at a very high cost.[35] Thus, in a competitive bid situation, a minority contractor might not be able to compete because he cannot obtain a bond or cannot compete effectively because he has the added cost of the high bond. Greater assistance could be provided to the minority enterprise to ensure that there exists a source of bonds at a fair rate for minority businesses.

[34] *JA: What's It All About,* Junior Achievement, Inc. U.S.A. 1976.

While all of these programs discussed *supra* furnish benefits in the form of technical assistance to minority business enterprises, they are less onerous in that they do not constitute a race-based classification which guarantees an absolute preference to minority business enterprises on account of race, at the same time absolutely depriving non-minority business enterprises of the right to obtain at least 10 percent of each grant under the PWEA.

e. *Sec. 211(d)(5) of P.L. 95-507*

The subcontracting requirements for direct competitively bid contracts let by any federal agency, found in Sec. 211 of P.L. 507, the Small Business Act Amendments of 1978, 92 Stat. 1767, 15 U.S.C. § 637 (d)(5) are also a less drastic means to achieve the government's claimed objective.[36] The program per-

[35] As noted *supra,* the GAO Report indicates that obtaining bonds is difficult for a minority business enterprise. *GAO* Report at 30-32.

[36] The Office of Federal Procurement Policy has promulgated regulations to implement Sec. 211, at 44 Fed. Reg. No. 78, April 20, 1979.

tains to small business concerns owned and operated by socially and economically disadvantaged individuals but provides that there are certain minorities which are presumed to be socially and economically disadvantaged (Black Americans, Hispanic Americans, and Native Americans). 15 U.S.C. § 637(d)(3). Sec. 211 requires that a low bidder for a direct competitively bid federal contract submit a plan which shows his best faith efforts to subcontract with businesses owned and controlled by socially and economically disadvantaged individuals.[37] 15 USC § 637(d)(5).

The less onerous nature of this requirement is clear; no individual would absolutely be awarded or denied a contract under the grant solely because of his race.[38] This program is structured to assisting businesses of socially and economically disadvantaged individuals. While contractors must make best faith efforts to utilize businesses owned by socially and economically disadvantaged individuals, there is no mandatory quota or goal requirement imposed by the Government.[39]

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[37] The approach taken in Sec. 211 of P.L. 95-507 is similar to the race-conscious approach taken by Harvard College in its admission program, which Justice Powell has found constitutional. *Bakke, supra* at 316. (Powell, J.)

[38] As previously noted (see page 23, n. 27, *supra*), in its consideration of P.L. 95-507, the Congress considered and rejected a flat quota provision. Sec. 211 of P.L. 95-507, in the case of competitively bid contracts, under the contracting officer may in the solicitation indicate a goal, but it is purely informational in nature. 15 U.S.C. 637(d)(5), 44 Fed. Reg. at 23,612 (1979). Additionally, only the contractor who is the low bidder is required to submit a plan.

[39] Petitioner submits that the Government's claimed objective can be achieved without resort to goals or quotas mandated by Congress or imposed by the Government. Even if this Court were to find that goals and quotas were necessary to achieve the claimed objective, Petitioner submits that there are programs far less drastic than the MBE program implemented by the EDA pursuant to the MBE provision set forth in Sec. 103(f)(2) of the PWEA. For example, another less drastic approach is the following program: 1) inclusion of a specific provision requiring the use of minority subcontractors in certain contracts determined according to the size of the contract, the nature of the work, and current availability of minority firms; 2) a provision for low bidder to request a waiver or modification after making good faith efforts; 3) a provision for granting of a waiver by the contracting agency to the contractor upon a determination such contractor used good faith efforts and a determination that willing and able minority contractors are not available; 4) a requirement that the contracting agency assist general contractor to meet the prescribed goal where it determines not to waive or modify the special provision; 5) modification or waiver of the specific provision if after fifteen days the contracting agency is unable to locate enough ready, willing and able minority contractors to achieve the goal of the specific provision. *See* "The Illinois MBE Program, A Different Approach That Could Work", Constructor, Vol. LX, No. 10 (October 1978).

In sum, it is not evident that the 10 percent MBE provision will have any significant effect on the problems. *See Bakke, supra,* at 311 (Powell, J.). Second, the 10 percent MBE provision in the PWEA cannot be justified since it has not been shown to be the "less drastic means" of effectuating the objective behind the provision. As set forth, supra, there are clearly less drastic alternatives which the Congress could have been selected to achieve the Government's claimed objective and which should have been considered by the Congress. Assuming *arguendo* that there was a compelling governmental interest for the MBE inasmuch as it was not the less drastic alternative, it fails the strict scrutiny test and violates the Due Process Clause of the Fifth Amendment.

D. Sec. 103(f)(2) of the PWEA fails to meet the standard set forth by Justice Brennan in Regents of California v. Bakke, supra.[40]

The 10 percent MBE provision does not withstand the test set forth by Justice Brennan in *Bakke, supra.* The legislative history of the MBE provision is sparse. It clearly has not been shown (*see* pages 10-23, *supra*) that the 10 percent MBE provision is "substantially related to the achievement of its objectives, and that there is an important and articulated purpose for its use." *Bakke, supra* at 359, 361.

Further, the 10 percent MBE requirement does not comply with Justice Brennan's standard because it stigmatizes minority business enterprises. The great majority of American people oppose preferences based on race instead of merit. In a recent Gallup Poll, 83 percent of the population and 64 percent of the non-white population thought that merit should be the standard by which one is judged.[41] The 10 percent MBE provision is a race-based quota and as such "may imply to some the recipients' inferiority and especial need for protection." (footnote omitted). *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977).

The belief that those who must rely on quotas cannot and would not make it on their own merits harms

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[40] In *Bakke, supra* at 359, 361, Justice Brennan stated that the test to be used for reverse discrimination cases based on race is:

> ". . . that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives' . . . [and] to justify such a classification an important and articulated purpose for its use must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program."

[41] *See* N. Y. Times, May 1, 1977, at 33 (Column 1).

those who want the opportunity to be judged on their own merit. Thus, a MBE who receives a contract under the PWEA may actually be stigmatized as a result and harm not only his own image but the image of minority contractors generally. This is especially true in the construction industry which is grounded on commitment to the competitive bidding system.

The 10 percent MBE provision also singles out those least well represented in the political process to bear the brunt of a benign program. Socially and economically disadvantaged enterprises not owned by the minorities singled out in the MBE provision are excluded from favored treatment even though they could and do face the same obstacles as the minorities protected by the provision. Inasmuch as the 10 percent MBE requirement has not been shown to be substantially related to the achievement of its purported objective, stigmatizes the favored minorities, and forces other socially and economically disadvantaged groups not given favorable treatment in the provision to "bear the brunt of this benign program", it does not meet the standard set forth by Justice Brennan in *Bakke.*

II.

Sec. 103(f)(2) of the PWEA Violates Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq.

Sec. 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Under the PWEA, the Secretary of Commerce distributes grants (federal financial assistance) to state and local governments for the construction of public works contracts. State and local grantees contract with private contractors for the construction of these public works projects. The state and local governments, in accordance with the 10 percent MBE provision and its implementing regulations and guidelines excluded nonminority contractors from participation in at least 10 percent of each grant made under the PWEA solely on the basis of race.

It is clear that the 10 percent MBE provision of the PWEA violates the plain language of Title VI, which provides that "race cannot be the basis of excluding anyone from participation in a federally funded program." [42] *Bakke supra* at 2814-15. (Stevens, J., concurring and dissenting, joined by the Chief Justice, Justice Rehnquist, and Justice Stewart.) [hereinafter referred to as Stevens, J.] The legislative history of Title VI reveals that its purpose was to prohibit the exclusion of any individual from a federally funded program on the ground of race.[43] *Id.* at 2811, citing H.R. Rep. No. 914, Part I, 88th Cong. 1st Sess. 25 (1963) U.S. Code Cong. & Admin. News 1964, p. 2401.

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[42] *See Flanagan* v. *President and Directors of Georgetown College*, 417 F.Supp. 377 (1976). In *Flanagan* v. *President and Directors of Georgetown College, supra* at 385, the Court held that Defendants who are recipients of federal financial assistance violated Title VI by discriminating against plaintiff, a white (Caucasian) student on the basis of race in the allocation of federal financial aid to students at Georgetown University Law Center.

[43] If this Court were to conclude that Title VI and Section 103 (f)(2) of the MBE provision conflicts and are irreconcilable, then a question of due process arises with respect to contractors having to comply with both statutory provisions.

In *Bakke, supra,* at 418, Justice Stevens held that Title VI prohibits any person from being excluded from participation in a program receiving federal financial assistance and found that the Davis admissions program, which excluded Bakke because of his race, violated Title VI. Justice Powell reads Title VI as proscribing only those racial classifications which would violate the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment. In holding that the Davis Admissions program violated the Equal Protection Clause of the Fourteenth Amendment, Justice Powell thereby finds that the Davis Admissions program violated Title VI.

In *Associated General Contractors of California* v. *Secretary of Commerce,* 441 F.Supp. 955, 969, (C.D. Cal. 1977), *vacated and remanded,* 438 U.S. 909 (1978),[44] the District Court, finding the MBE a "glaring and flagrant violation of both the congressional intent and national policy . . ." which is set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* held that the MBE provision is invalid and illegal under Title VI. In sum, the MBE provision violates the clear language of Title VI and its legislative history as recognized by Justice Stevens.[45]

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[44] On remand, the District Court determined that the issues ruled upon in its initial decision were not moot and reaffirmed its prior decision. 459 F.Supp. 766 (C.D. Cal. 1978), *appeal pending,* —— U.S. ——, No. 78-1382 (March 9, 1979).

[45] The decision of this Court in *Weber, supra* is not determinative of the instant case. The statute, which was the basis of the challenge was Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* rather than Title VI which is the statutory basis for challenging the MBE provision in the instant case. In *Weber,* this Court narrowly held that Title VII does not prohibit private voluntary race-conscious affirmative action plans which are designed

CONCLUSION

Petitioner respectfully submits that this Court should reverse the decision of the Court of Appeals and hold that the 10 percent MBE provision of the PWEA violates the Fifth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964, as amended.

Respectfully submitted,

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to eliminate conspicuous racial inbalance in segregated job categories. This Court specifically noted that Title VI and Title VII are clearly distinct statutory provisions with different purposes and different statutory authorities. *Weber, supra,* (slip op., 10-11, n.6).

APPENDIX

APPENDIX A

The Associated General Contractors of America is a nationwide, non-profit membership organization [hereinafter AGC] which represents general contractors who construct, *inter alia,* highways and municipal projects of the type for which grants have been made under the Public Works Employment Act of 1977 (P. L. 95-28). There are approximately 8,100 AGC members nationwide and AGC members constructed approximately 81 percent of government public works projects in 1972, according to the most recent data available. One of AGC's prime tenets supports strongly the use of competitive bidding to encourage efficient practices among its members, as well as to ensure the American taxpayer more construction per tax dollar. Thus, AGC is concerned over the injection into the federal construction program of a non-merit system. AGC intended to file an *amicus curiae* brief on the merits in this case (*Fullilove* v. *Kreps,* No. 78-1007) and had obtained the consent of all the parties. However, since the views of Petitioner, General Building Contractors of New York State, Inc., the New York State Building Chapter, Associated General Contractors of America, Inc. set forth herein in its brief reflect the views of AGC, no separate brief will be filed.

Supreme Court, U. S.
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No. 78-1007

In the Supreme Court of the United States

OCTOBER TERM, 1979

H. EARL FULLILOVE, ET AL., PETITIONERS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, ET AL., PETITIONERS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE

OPINIONS BELOW

The opinion of the court of appeals (A. 206a-224a) is reported at 584 F.2d 600. The opinion of the district court (A. 183a-204a) is reported at 443 F. Supp. 253.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1978. The petition for a writ of certiorari was filed on December 21, 1978, and granted on May 21, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the minority business enterprise provision of the Public Works Employment Act of 1977 violates the Fifth Amendment or Title VI of the Civil Rights Act of 1964.

STATEMENT

1. In July 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. 6701-6710, charged the Secretary of Commerce with the responsibility of disbursing the funds through the Economic Development Administration. The Act provided that the funds were to be available for appropriation until September 30, 1977. 42 U.S.C. 6710.[1] In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects. The total of six billion dollars was to be available for appropriation until December 31, 1978. 42 U.S.C. (Supp. I) 6710.[2]

[1] The Local Public Works Act itself merely authorized the appropriation of two billion dollars for the local public works program. Congress made the actual appropriation several weeks later in the Public Works Employment Appropriations Act, Pub. L. No. 94-447, 90 Stat. 1497.

[2] On the same day that Congress authorized the appropriation of an additional four billion dollars for the local public works program, it appropriated the full amount of the newly authorized funds. 91 Stat. 123-124.

The new statute, entitled the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat 116-121, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. (Supp. I) 6705(f)(2), the "minority business enterprise" provision.[3] Section 103(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

The circumstances under which the Secretary will waive the 10% minority set-aside requirement are described in regulations promulgated under the Act. 13 C.F.R. 317.19(b)(2).

[3] The changes are codified in 42 U.S.C. (Supp. I) 6701 and note, 6705-6708, and 6710 and note.

Section 103 of the Public Works Employment Act of 1977 added subsection (f)(2) to Section 106 of the Local Public Works Capital Development and Investment Act of 1976 (see 91 Stat. 116-117). The parties and the courts below have referred to the minority business enterprise provision as Section 103(f)(2) and, to avoid confusion, we will continue to refer to it in that manner.

The 1976 Act and the 1977 amendments contained several provisions designed to ensure that the local public works program would have its intended effect of providing an immediate boost to the economy generally and the construction industry in particular. Congress directed that no part of any public works project funded under the statute should be performed directly by any state or local government agency, but rather that all project construction should be performed by private contractors who submit the lowest competitive bids in response to invitations from the grantees and who meet established criteria of responsibility (42 U.S.C. (Supp. I) 6705(e)(1)). In addition, Congress required grant applicants to give satisfactory assurance that on-site labor would begin within 90 days of project approval (42 U.S.C. 6705(d)) and instructed the Secretary to make a final determination on each grant application within 60 days of receipt (42 U.S.C. (and Supp. I) 6706). Moreover, the federal funds were required to be committed to state and local grantees by September 30, 1977 (see note 30, *infra*).

In accordance with the requirements of the 1976 Act, 42 U.S.C. (and Supp. I) 6706, the Secretary issued regulations to implement the local public works program. The regulation concerning the minority business enterprise provision stated (13 C.F.R. 317.19 (b)):

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

> (2) The restriction contained in paragraph (b)(1) of this section will not apply to any grant for which the Assistant Secretary [for Economic Development] makes a determination that the 10 percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

See also 13 C.F.R. 317.35(j). To supplement and elaborate on the statute and regulation, the Economic Development Administration issued guidelines governing minority business participation in local public works grants (A. 156a-167a) and a technical bulletin (A. 129a-155a) providing detailed instructions and information to assist grantees and their contractors in meeting the 10% minority business enterprise (MBE) requirement.

The guidelines state (A. 157a) that "[t]he primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees." This obligation can be satisfied through the grantee's "own simple or prime contracts or through the subcontracts or supply contracts of its prime contractors" (A. 162a). Grantees must submit reports to EDA, both before the first federal letter of credit is issued and when the project is 40% complete, describing actual and expected minority business participation (A. 162a-164a). In addition, grantees must file a statement from each participating minority firm "certifying that the minority firm is a *bona fide* minority business enterprise and that the minority firm has executed a binding contract to pro-

vide a specific service or material to the project for a specific dollar amount" (A. 164a).

The guidelines provide that EDA will approve a grantee's request for a waiver of the minority business requirement if the grantee "demonstrate[s] that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location" (A. 165a). Recognizing the problems that a grantee may encounter in attempting to comply with the MBE provision in an area where the minority population is small, the guidelines permit a grantee to "apply for a waiver before requesting bids on its project or projects if it can show that there are no relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project" (A. 166a).

By the time Congress authorized the additional four billion dollars of local public works grants in May 1977, all grants authorized by the 1976 Act had been awarded. The further grants authorized in 1977—the grants to which the minority business enterprise provision applied—were all awarded by September 30, 1977. Information submitted to the district court shows that respondent New York State received at least 45 grants totaling $42,119,000 from funds appropriated in 1977 and that respondent New York City received at least 83 grants totaling $193,838,646 (A. 36a).[4]

[4] Although all grants were awarded more than two years ago, construction on many funded public works projects is not yet complete. Moreover, in October 1979, we were informed by the Economic Development Administration that there were some cost underruns on New York City projects and that additional contracts would be let to utilize the remaining funds and that the MBE provision may apply to these contracts. There is also the possibility that on some projects the EDA will find that a subcontractor represented to be a minority business enterprise is not in fact a *bona fide* MBE. This may result in a requirement that the grantee expend other project funds for an acceptable minority contract, that he return a portion of the grant funds to the United States Treasury, or that he obtain a waiver.

2. On November 30, 1977, petitioners—four associations of construction firms and a mechanical contracting firm specializing in heating and air conditioning work—filed this action in the United States District Court for the Southern District of New York. They alleged (A. 11a-12a) that Section 103(f)(2) of the Act, the minority business enterprise provision, caused them competitive injury by excluding them from participating in subcontracts that they otherwise would have obtained in competitive bidding, by requiring them to subcontract work that they ordinarily would have performed themselves, and by compelling them to choose subcontractors according to criteria other than the amount of their bids and their performance records. They contended (A. 13a-15a) that Section 103(f)(2) establishes an impermissible racial classification and violates the Fifth and Fourteenth Amendments, the Reconstruction Civil Rights Acts (42 U.S.C. 1981, 1983, 1985), and Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e *et seq.*). Petitioners sought a temporary restraining order and a permanent injunction

against enforcement of the minority business enterprise provision by the Secretary of Commerce and the state and local respondents (recipients of funds distributed under the Act). Petitioners also sought a declaratory judgment that Section 103(f)(2) is "unconstitutional, illegal[,] void[,] and unenforceable" (A. 19a).

After a trial,[5] the district court denied petitioners' requests for relief and dismissed the complaint. The court held (A. 187a) that

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[5] Petitioners presented only two witnesses. Both were officers in construction firms belonging to one of the petitioner associations. Each testified that his company had been awarded contracts funded under the Act and that, in order to satisfy the requirements of Section 103(f)(2), the company would obtain supplies or services from minority subcontractors. The witnesses stated that, in the absence of the MBE provision, their firms would deal with other subcontractors who could offer lower prices, more experience, or both. They conceded, however, that any additional costs attributable to the use of minority subcontractors would be reflected in the overall bid and would thus be passed on to the local grantee (and ultimately to the federal government) (A. 58a-97a).

The president of petitioner Shore Air Conditioning Company submitted an affidavit (A. 23a-27a) alleging that the company's low bid on one project had been rejected because the grantee determined that the purported minority subcontractor with which Shore proposed to deal was not a bona fide minority business enterprise within the meaning of the Act and that therefore Shore's bid did not satisfy the requirements of Section 103(f)(2). With the exception of this affidavit, petitions offered no direct evidence that they or any of their member firms had lost business as a result of the MBE provision. No subcontractor testified at trial.

James F. McNamara, an Assistant Commissioner of the New York State Division of Human Rights, appeared as a

> the MBE requirement is an entirely constitutional method of remedying prior acts of discrimination in the construction industry and one which is fully consistent with the civil rights laws that preceded it.

The court acknowledged that the provision "distinguishes among various business enterprises, at least in part, based upon the racial background of their principals" (A. 191a). Because of the statute's reliance on race, "an inherently 'suspect' classification," the district court determined that "rigid scrutiny of

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witness for the Secretary and testified about the problems encountered by minority contractors in the construction industry. He explained that bonding requirements frequently pose a serious obstacle for minority businessmen "because the insurance companies and the banks will not cooperate with them if they don't have an established track record [and t]hey can not establish a track record if they don't get a chance to perform" (A. 113a). He also stated that minority firms have difficulty securing contracts because many of their employees are minority workers who are not union members and whom the unions refuse to accept (*ibid.*). In addition, the witness said that minority contractors operate at a disadvantage because "[t]hey are not plugged in on the information. They may not be able to get advanced drawings or may not be able to get access to * * * the preliminary plans and budget estimates. * * * [B]y not having access to this information they are further frozen out" (A. 114a). McNamara reported that the New York State agencies participating in the MBE program considered it to be "the first really successful route in assuring that there will be a portion of the work going to minority contractors" (*ibid.*). He also testified that the MBE provision had improved the employment prospects for minority workers, among whom the unemployment rate was almost twice as high as that prevailing within the white population (A. 115a).

both Congressional purpose and the means selected to effectuate that purpose is clearly mandated" (*ibid.*). The court stated that, in order to satisfy constitutional requirements, the MBE provision must serve a compelling governmental interest and must be no more discriminatory than other available means of accomplishing the same objective (*ibid.*). The court found (A. 192a-202a) that the MBE provision passes both parts of this test.

With respect to the legitimacy of the congressional purpose underlying the 10% minority participation standard, the court first noted petitioners' concession that a racial classification serves a compelling government interest if it is intended to remedy the effects of present or past discrimination (A. 192a). The district court then reviewed the available materials and concluded that Congress acted with just such a remedial purpose in mind. The court examined the limited legislative history of the MBE provision itself, the numerous other federal antidiscrimination measures in recent years, and the empirical data available to Congress reflecting the disproportionately small role of minority business concerns in the national economy generally and the construction industry in particular. On the basis of this evidence, the district court concluded that Section 103(f)(2) "was incorporated into the Act after only brief debate because of a general awareness of the compelling need for legislative action capable of overcoming the effects of prior discrimination against minority businesses seeking to participate in government contracting" (A. 196a-197a).

Turning its attention to the means chosen by Congress to accomplish this purpose, the district court ruled (A. 199a-202a) that the 10% MBE requirement is a reasonable method of "promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry" (*id.* at 202a). In support of this holding, the court cited (1) "the consistent failure of less intrusive attempts to nurture the growth of minority enterprises" (A. 202a); (2) the limited percentage of annual government contracting affected by the MBE requirement (A. 201a); (3) the short-term nature of the local public works program established by the Act (A. 201a-202a); and (4) the availability of a waiver provision to guard against the possibility that work on funded projects would be disrupted in particular areas by the lack of sufficient qualified minority businesses to fulfill the 10% requirement (A. 201a).

Finally, the district court rejected (A. 202a-203a) petitioners' contention that the MBE provision violates the Civil Rights Act of 1866 and 1964. The court stated that "it defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts" (*ibid.*).

4. The court of appeals affirmed (A. 206a-224a). The court held that "even under the most exacting standard of review the MBE provision passes constitutional muster" (A. 211a). The court therefore found it unnecessary to determine "[w]hether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race" (*ibid.*).

The court of appeals agreed with the district court that the minority business enterprise provision in the 1977 Act was intended to remedy past discrimination against minority construction businesses (A. 215a). The court also agreed with the district court that materials available to Congress provided ample support for the conclusion that the severe shortage of potential minority entrepreneurs with general business skills is a result of their historic exclusion from the mainstream economy and that "the history of discrimination was specific to the construction industry" (A. 218a; see also A. 194a).

Acknowledging that remedies for past discrimination should be "sensitive to interests which may be adversely affected" by such relief (A. 220a), the court of appeals analyzed the likely impact of the minority business enterprise provision on non-minority contractors. For reasons similar to those that persuaded the district court, the court of appeals ruled that Section 103(f)(2) would not have an inequitable effect on a "'small, ascertainable group of non-minority persons'" (A. 221a, quoting from

EEOC v. *Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976)). The set-aside for minority contractors, the court noted (A. 221a-222a; footnote omitted),

> extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of [petitioners], who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry. Considering that nonminority businesses have benefitted in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

SUMMARY OF ARGUMENT

1. In the exercise of its power to spend public money for the general welfare, Congress enacted the Public Works Employment Act of 1977 to revive the sluggish construction industry and stimulate the economy generally. As part of its prescription for the appropriate use of four billion dollars in federal funds, Congress provided that, to the extent possible, 10% of the funds granted for each local public works project should be expended for minority business en-

terprises. By thus conditioning the grant of federal monies to state and local applicants, Congress sought to remedy the effects of racial and ethnic discrimination in the construction industry and to ensure that minority contractors would share equitably in the benefits conferred by the public works program. Such a legislative purpose is unquestionably legitimate.

The Thirteenth and Fourteenth Amendments empower Congress to enforce the constitutional prohibition against slavery and involuntary servitude and to secure the equal protection of the laws for persons of every racial and ethnic background. When Congress acts in pursuit of its enforcement responsibilities under the Civil War Amendments, it enjoys a considerable flexibility in fashioning measures to achieve its important antidiscrimination objectives. As Mr. Justice Powell observed in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 302 n.41 (1978), this Court has "recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." When the congressional aim is to eliminate discrimination and remedy its effects, race-conscious affirmative measures are permissible, provided that they do not impose excessive burdens on persons outside the group benefited by the legislative action. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 362-369 (opinion of Brennan, White, Marshall, and Blackmun, JJ.);

United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 435 (1975).

2. Petitioners contend that the minority business enterprise provision is invalid, because Congress did not adequately describe and document the remedial purpose for the statute's enactment. This argument rests on an erroneous view of the legislative process.

Congress does not sit as a court or an administrative agency making individualized decisions on the basis of a limited record. Rather, Congress legislates broad general rules for the governance of the nation as a whole, and it acts on the basis of everything it knows about a particular problem, regardless of the source. Congress is not bound to consider only materials that satisfy certain evidentiary standards, and it is not required to announce, in accordance with some predetermined format, the reasons for legislative action. Article I of the Constitution prescribes the procedures that Congress must follow in enacting a law, and nowhere does it mention any requirement of "detailed findings in the legislative record" such as petitioners would impose.

The courts below properly examined all evidence of the legislative purpose underlying the minority business enterprise provision and correctly concluded that Congress enacted the measure in order to remedy the effects of discrimination against minority-owned businesses. While the primary aims of the Public Works Employment Act were economic, Section 103(f)(2) was added to the statute to ensure

that the newly authorized funds would not be used to perpetuate or reinforce discrimination in the construction industry. Congress' purpose in enacting the 10% minority set-aside provision emerges clearly when the contemporaneous legislative history is considered in conjunction with Congress' knowledge of the economic plight of minority businesses and workers, its awareness of past discriminatory practices, and its disappointing experience with earlier legislative efforts to encourage the development of minority business firms.

3. The MBE provision was a proper means by which Congress could accomplish its remedial purpose. Congress ordinarily enjoys considerable discretion in exercising its enumerated powers, and that principle is particularly compelling when Congress acts to enforce the guarantees of the Civil War Amendments. Because of its investigative capabilities and its representative role in our tripartite system of government, the Legislative Branch is uniquely suited to devise remedial measures that promise effective solutions to difficult social problems and that take adequate account of the competing interests at stake in the distribution of government benefits, and to adjust those remedies in the light of experience.

The 10% minority set-aside provision was a reasonable congressional response to the failure of previous legislative measures to generate significant minority participation in federal contracting programs and to the need for expedition in providing emergency economic relief under the local public

works program. Congress had ample reason to believe that, if minority businesses were to obtain any meaningful benefit from the new appropriation authorized in 1977, affirmative measures like those contained in the MBE provision were necessary.

The solution chosen by Congress did not impose any undue disadvantage on nonminority contractors. This Court has acknowledged that some "sharing of the burden" of past discrimination may be required for remedial purposes (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976)), and the "sharing" required here did not have any significant adverse effect on the members of petitioner associations. The racial classification was employed only on a short-term basis and only in one federal program. No contractor was precluded from bidding on any particular contract, and, as long as the overall 10% requirement was met, no grantee was required to award any particular contract to a minority business. The 10% set-aside did not "stigmatize" any identifiable nonminority group, and no nonminority contractor was excluded from his occupation by the partial preference given to nonminority businesses. Pursuant to the statutory authorization in Section 103(f)(2), the Secretary established and utilized a waiver procedure to deal with the possible unavailability of sufficient qualified minority contractors to satisfy the 10% requirement on particular projects.

For all these reasons, the members of petitioner associations suffered no unnecessary adverse impact from the 10% minority set-aside provision. Peti-

tioners' argument that Congress could have achieved the same result through "less drastic" means is unpersuasive. The alternatives suggested by petitioners also involve the use of race as a selection or eligibility criterion and in that way are constitutionally indistinguishable from Section 103(f)(2). A broader selection standard, such as social or economic disadvantage, would have included many persons who were not members of minority groups that had suffered discrimination in the past. Congress reasonably could have concluded that the eligibility of such persons for the limited special treatment required in the federally funded program would have impeded the achievement of the legitimate goal of remedying the effects of discrimination in the construction industry.

4. The minority business enterprise provision does not violate Title VI of the Civil Rights Act of 1964. *Regents of the University of California* v. *Bakke*, *supra*, established that Title VI does not prohibit a constitutionally valid, remedial race-conscious program. 438 U.S. at 287 (opinion of Powell, J.); *id.* at 325-326 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). Where two statutes are capable of co-existence, the courts must regard each as effective. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Moreover, even if there were a conflict, it should be resolved in favor of the later-enacted and more specific statute, the Public Works Employment Act of 1977.

ARGUMENT

THE MINORITY BUSINESS ENTERPRISE PROVISION OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 DOES NOT VIOLATE THE FIFTH AMENDMENT OR TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

A. Congress Has Broad Authority to Remedy the Effects of Past Discrimination Through the Exercise of the Spending Power and the Powers Conferred by the Enforcement Sections of the Thirteenth and Fourteenth Amendments

This Court has often acknowledged the congressional power to spend money in the national interest and to impose conditions on such expenditures, especially those in the form of grants to state or local governments or private entities. See, *e.g.*, *Helvering* v. *Davis*, 301 U.S. 619, 640-641 (1937); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143, 144 (1947); *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 50 (1974); *Buckley* v. *Valeo*, 424 U.S. 1, 91 (1976). Moreover, the Court has recognized that the concept of the general welfare is not static and that Congress retains substantial discretion to determine the ways in which federal funds should be allocated and distributed. As Mr. Justice Cardozo wrote for the Court in sustaining the constitutionality of the Social Security Act, "[n]eeds that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What

is critical or urgent changes with the times." *Helvering* v. *Davis*, *supra*, 301 U.S. at 641.

The elimination of the effects of past or present racial and ethnic discrimination is unquestionably a legitimate purpose for which Congress may exercise its spending power. The Constitution itself establishes the legitimacy of such a legislative aim. The enforcement sections of the Thirteenth and Fourteenth Amendments authorize Congress to enact measures to eliminate slavery and involuntary servitude and to ensure that no state denies to any person within its jurisdiction the equal protection of the laws. Whatever the precise scope of congressional power under the Civil War Amendments,[6] those additions to the

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[6] In *Katzenbach* v. *Morgan*, 384 U.S. 641, 650-651 (1966), the Court stated that, by including Section 5, the enforcement section, in the Fourteenth Amendment, "the draftsmen sought to grant to Congress * * * the same broad powers expressed in the Necessary and Proper Clause * * *. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Similarly, in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968), the Court declared that the enforcement section of the Thirteenth Amendment gives Congress the power "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Congressional power under the Thirteenth Amendment extends to private as well as public activity. See *Runyon* v. *McCrary*, 427 U.S. 160, 168-173 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); *Tillman* v. *Wheaton Haven Recreation Assn*, 410 U.S. 431, 439-440 (1973); *Jones* v. *Alfred H. Mayer Co.*, *supra*. See also *United States* v. *Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring); *id.* at 781-782 (Brennan, J., concurring in part and dissenting in part) (congressional power under the Fourteenth Amendment may reach private activity).

Constitution plainly demonstrate that remedying the effects of discrimination based on race or national origin is one goal toward which Congress may properly exercise each of its enumerated powers. In particular, Congress may spend public funds in a manner designed to guarantee that the benefits of federal grant programs are not denied to persons who have suffered discrimination in the past.

In the last 20 years, Congress has enacted numerous statutes intended to eliminate discrimination and its effects from federally funded programs.[7] Congress has also passed other antidiscrimination measures addressed to different areas of public and private activity.[8] The form of this legislation has varied as

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[7] The statute with the most comprehensive coverage is Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which broadly prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Since the passage of Title VI, many other specific federal grant statutes have contained similar prohibitions against discrimination in particular funded activities. See, *e.g.*, State and Local Fiscal Assistance Amendments of 1976, 31 U.S.C. 1242; Energy Conservation and Production Act, 42 U.S.C. 6870; Housing and Community Development Act of 1974, 42 U.S.C. 5309; Comprehensive Employment and Training Act of 1973, 29 U.S.C. 991.

[8] The congressional effort to end discrimination and its effects began after the Civil War with the enactment of the Civil Rights Act of 1866, 42 U.S.C. 1981 *et seq.* See generally B. Schwartz, *Statutory History of the United States-Civil Rights* (1970). Legislative activity has substantially increased

Congress has acquired experience in dealing with the continuing problems of racial and ethnic discrimination. Compare, for example, the relatively simple provisions enacted in 1957 to protect the voting rights of racial minorities [9] with the elaborate procedures established eight years later for the same purpose.[10]

Although many early federal statutes did not go beyond bare prohibitions against discrimination, Congress is not limited to such negative commands. This Court has sustained legislation that requires race-conscious affirmative measures to eliminate discrimination and its effects. See generally *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 362-369 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.). For example, under Title VII of the Civil Rights Act of 1964, employers

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since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). See, *e.g.*, the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; the 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400; the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81-90; the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; the Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521; and the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251.

[9] See Section 131 of the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 637 (codified in 42 U.S.C. (1958 ed.) 1971(b)-(e)).

[10] See the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified in 42 U.S.C. (1964 ed., Supp. III) 1973-1973p).

may be required to avoid racially disparate effects of employment tests by using racial criteria (*i.e.*, one passing score for blacks and another for whites) so that tests will predict success on the job equally well for each racial group. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 435 (1975) (discussing with approval EEOC Guidelines requiring "differential validation" of employment tests for minority and nonminority groups where technically feasible). The Voting Rights Act of 1965 permits officials to take race into account in apportioning legislative districts in a way that fairly represents the voting strength of different racial and ethnic groups. *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Guidelines issued under Title VI of the Civil Rights Act of 1964 require "affirmative steps to rectify the language deficiency * * * [w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district." 35 Fed. Reg. 11595 (1970); see *Lau* v. *Nichols*, *supra*, 414 U.S. at 568.

This Court has held that Congress may generalize in identifying the victims of discrimination where, as here, measurement of the effects of discrimination on an individual basis is impractical or impossible. See *Gaston County* v. *United States*, 395 U.S 285, 295-296 (1969); *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 377-378 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). See also *Teamsters* v. *United States*, 431 U.S. 324, 357-

362 (1977). Similarly, the impact of remedial legislation enacted by Congress to eliminate and redress the effects of past discrimination need not be limited to proven discriminators. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 366 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 774-775, 777 (1976); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Even if individual recipients of financial assistance or nonminority contractors have not themselves discriminated, Congress may require them to adjust their conduct in order to ensure, for example, that in the allocation of funds under the 1977 local public works program minorities do not suffer the lingering effects of past discrimination in the construction industry.

Katzenbach v. *Morgan*, 384 U.S. 641 (1966), illustrates this point. There, the Court upheld federal legislation prohibiting application of New York State's literacy requirements to citizens educated in schools accredited by the Commonwealth of Puerto Rico, regardless of whether the New York requirement itself violated the Fourteenth Amendment. The Court explained (384 U.S. at 653) that Congress, in the exercise of its power under Section 5 of the Fourteenth Amendment, was the proper governmental branch to

> assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on

> the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.

Morgan thus demonstrates that, when Congress has determined that a particular measure is necessary to remedy a Fourteenth Amendment violation or to prevent the occurrence of such a violation (*e.g.*, the discriminatory denial of public services to Puerto Ricans), the Court will not interfere and reweigh the factors considered by Congress in reaching that judgment, even if the legislative solution chosen adversely affects some state practice (*e.g.*, the use of a literacy test as a qualification for voting) that itself does not necessarily violate the Fourteenth Amendment or any other constitutional provision. See also *United Jewish Organizations* v. *Carey*, *supra*, 430 U.S. at 161; *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

The same reasoning applies here. Congress is the governmental body uniquely well situated to determine which groups have suffered discrimination in the past and what measures are most likely to prevent further discrimination and to restore members of those groups to the position they would have occupied had the discrimination not occurred. As Mr. Justice Powell observed in *Bakke*, this Court has "recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination

and its discretionary authority to take appropriate remedial measures." 438 U.S. at 302 n.41.

Indeed, petitioners have conceded (A. 192a) that the racial classification established by the minority business enterprise provisions serves a compelling governmental interest if it is intended to remedy the effects of present or past discrimination. They argue, however, that the legislative history of Section 103(f)(2) "fails to evince findings of prior discrimination sufficient to justify upholding" a federal grant statute that takes race and national origin into account in distributing government funds (Pet. Br. 14-21; GBC Br. 10-17).[11] They also contend (Pet. Br. 21-28; GBC Br. 18-31) that, even if Congress' purpose was to remedy the effects of past discrimination, the 10% minority set-aside is an unacceptable method of accomplishing that end, because it imposes an unnecessary burden on nonminority businesses that wish to compete for local public works funds. We address these arguments in turn.

B. Congress Concluded that Legislative Action Was Necessary to Eliminate the Effects of Discrimination in the Construction Industry

1. Inquiry into the congressional purpose underlying the MBE provision must begin with an appreciation of the unique nature of the legislative role. While courts decide cases and controversies on the basis of

[11] "Pet. Br." refers to the brief apparently filed by all petitioners. "GBC Br." refers to the brief filed by petitioner General Building Contractors of New York State, Inc.

individual records, legislatures address broader problems and attempt to devise solutions that extend beyond the parties to any single dispute. As this Court observed in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 n.10 (1974), "[t]he legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." A legislature, unlike a court or an administrative agency, is not obligated to confine its attention to the material contained in a record compiled for the resolution of a particular dispute. Rather, it is empowered to make laws on the basis of information obtained from a variety of sources in a variety of ways. It may rely on the accumulated experiences of its individual members and on its collective evaluation of the success or failure of past legislative attempts to solve particular problems. When it desires additional information, it may conduct its own investigation unrestricted by many of the procedural rules that govern judicial and agency action.

These distinctive features of the legislative role, which are, of course, rudimentary in our system of separation of powers, bear repeating here because of the kind of attack petitioners level against the minority business enterprise provision. Petitioners assert that Section 103(f)(2) of the Public Works Employment Act is invalid because the legislative history of the statute does not contain the "detailed findings of constitutional or statutory violations (Pet. Br. 15)

allegedly necessary to justify the use of a racial classification in the distribution of government benefits. Petitioners maintain that the courts below erred by "embark[ing] on a search outside of the legislative record in an effort to sustain" the MBE provision (Pet. Br. 17).

This argument is based on a false premise. By their unstated assumption that congressional policy decisions must stand or fall on the basis of a limited collection of materials known as the "legislative record," petitioners cast Congress in the role of an administrative agency whose actions are subject to judicial review under something akin to the "substantial evidence" standard. Petitioners' challenge to the MBE provision thus rests on a fundamental misconception of Congress' place in our constitutional system. Contrary to petitioners' apparent belief, Congress may legislate on the basis of everything it knows about a particular situation, and it need not record every—or even any—element of factual support for a bill in the accompanying committee reports or in the course of floor debates.[12] Specific findings that a proposed remedial measure will assist only those who have suffered injury in the past and will adversely affect only those who have caused such injury are not necessary. "Congress may paint with a much broader brush." *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part).

[12] Indeed, neither committee consideration nor floor debate is required at all in order for a bill to be validly enacted into law under the procedures prescribed by Article I of the Constitution.

Because Congress is engaged in the business of framing general rules for the governance of society, not the resolution of individual disputes, judicial review of a federal statute proceeds differently from review of agency action. An agency ordinarily must state the reasons for its action in the administrative record, and if a reviewing court finds those reasons deficient, it will normally reverse and remand for further proceedings without examining other possible justifications for the agency's decision; this is often true even where the additional or alternative reasons for agency action are known to the court and supported by extra-record material. See *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). By contrast, in its efforts to ascertain legislative purpose on review of a federal statute, a court need not restrict its vision to the contents of a legislative record compiled by Congress. A court may look not only to the statute's legislative history, narrowly defined, but also to the language of the statute, its relationship with other federal laws, and any other available materials that may explain the congressional decision to adopt a particular measure.

To be sure, when a statutory provision involves a racial classification, a reviewing court must take special care in satisfying itself that the congressional purpose underlying the provision is legitimate and compelling.[13] But this does not mean that the court

[13] As four members of the Court stated in *Bakke*, "because of the significant risk that racial classifications established

must limit its attention to a discrete body of materials labelled the "legislative record." On the contrary, the court may and should consider all sources of information concerning the reasons for congressional action. Statutes involving racial classifications are, in this respect, no different from any others. Legislative purpose may be found in any materials that tend to reveal the reasons for a statute's enactment.[14] Cf.

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for ostensibly benign purposes can be misused, * * * it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown." 438 U.S. at 361 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Contrary to petitioners' contention (Pet. Br. 12 & n.4, 15 n.6), this statement was not intended to suggest that a statutory racial classification can never be sustained unless Congress includes in the "legislative record" specific findings of past discrimination and an explicit declaration that the statute's purpose is to remedy that discrimination. Indeed, the four members of the Court who joined the statement would have upheld the admissions program employed by the Medical School of the University of California at Davis, even though, as Mr. Justice Powell observed, the racial classification used in that program was not supported by any "determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts." 438 U.S. at 305. See also *id.* at 305-310. A fortiori here, where Congress *has* identified a history of discrimination in the construction industry and has enacted the MBE provision in response to that background, the constitutionality of the statute's reliance on minority ownership as a distinguishing factor for potential contractors in federally funded public works projects should be sustained.

[14] A different rule, such as the one advocated by petitioners, would encumber the legislative process in ways not required

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977);

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by, and arguably inconsistent with, Article I of the Constitution. An obligation to make a thorough "legislative record" for each statute would severely hamper Congress' ability to perform its lawmaking function, but would not contribute significantly to either the quality of the final legislative product or the reliability of the information available to a court on judicial review. Committee staffs presumably would be assigned the task of inserting voluminous prepared materials into the "legislative record" in order to ensure that a reviewing court would find a sufficient factual basis for congressional action. No substantive benefit would accrue to the lawmakers' empirical knowledge or their deliberative processes, but Congress might often be disabled, for practical purposes, from making eleventh-hour changes in proposed bills to reflect the realities of political compromise. The need to compile a "legislative record" adequate to survive the kind of judicial review contemplated by petitioners would inevitably reduce the usefulness of important legislative devices such as the floor amendment, through which Congress can adjust proposed statutory language in response to concerns raised during general debate and can thereby better fulfill its representative role.

This Court's decisions show that measures first advanced as floor amendments do not fail because of inadequate contemporaneous statements of legislative purpose. In *Katzenbach* v. *Morgan, supra,* for example, the Court sustained Section 4(e) of the Voting Rights Act of 1965, despite Congress' failure explicitly to declare the reasons for the statute's adoption. The Court examined the information known to Congress in order to determine whether there was a sufficient basis for the exercise of legislative power. See 384 U.S. at 651-656. Section 4(e) was a floor amendment to the Act, and the committee hearings and reports therefore did not refer to the provision. 384 U.S. at 669 n.9 (Harlan, J., dissenting). See also *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 252 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294, 299 (1964).

Califano v. *Goldfarb*, 430 U.S. 199, 212-217 (1977); *Califano* v. *Webster*, 430 U.S. 313, 316-321 (1977).

2. Applying these principles of judicial review, the district court and court of appeals in the present case correctly concluded that Congress added the MBE provision to the Public Works Employment Act of 1976 in order to remedy the effects of discrimination against minority-owned businesses. Of course, the primary aim of the Act as a whole (and its predecessor, the Local Public Works Capital Development and Investment Act of 1976) was to stimulate the national economy and especially the sagging construction industry. Unemployment in the industry was high, and Congress hoped that grants for local public works programs would generate construction jobs that would in turn induce a more widespread economic revival. S. Rep. No. 95-38, 95th Cong., 1st Sess. 1-2 (1977); H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1-2 (1977); A. 35a-44a, 188a & n.6. But those overall aims of the Act do not imply that Congress had no further purpose for enacting particular provisions in the statute. To the contrary, the available evidence demonstrates that the MBE provision was intended to redress past discrimination against black and other minority contractors, while at the same time contributing to the general congressional goal of "target[ing] the Federal assistance more accurately into the areas of greatest need." H.R. Rep. No. 95-20, *supra*, at 2.

When Congress enacted the MBE provision, it knew that the unemployment rate among minority workers was twice as high as that among nonminority workers. See 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke); *id.* at H1423 (daily ed. Feb. 24, 1977) (remarks of Rep. Stokes). *Public Works Employment Act of 1977: Hearings Before the Subcomm. on Regional and Community Development of the Senate Comm. on Environment and Public Works* 95th Cong., 1st Sess. 110, 137, 155, 401 (1977). Congress also knew that unemployment in the minority construction sector was particularly severe. 123 Cong. Rec. H1423 (daily ed. Feb. 24, 1977) (remarks of Rep. Stokes). Moreover, Congress acted against the backdrop of more than two decades of legislative efforts to end racial and ethnic discrimination in the market place and to remedy the effects of discrimination against minorities.[15] Experience with these earlier efforts gave Congress a broad perspective on the deep-seated nature of the problems encountered by minorities as a result of past discrimination in this country. As the court of appeals held in rejecting petitioners' argument that the MBE provision was not intended to remedy discrimination (A. 215a-216a, footnote omitted),

> [i]n view of the comprehensive legislation which Congress has enacted during the past decade and

[15] The term "minority" as used in the MBE provision refers to American citizens who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. Before the enactment of the MBE provision, this definition had been used in federal affirmative action efforts under regulations concerning the procurement of government supplies and the performance of government contracts. See, *e.g.*, 41 C.F.R. 1-1.1302, 1-1.1303, 1-1.1310-2.

> a half for the benefit of those minorities who have been victims of past discrimination, any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine.

See also *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 573 F.2d 811, 817 (3d Cir. 1978); *Rhode Island Chapter, Associated General Contractors of America* v. *Kreps*, 450 F. Supp. 338 (D. R.I. 1978). Cf. *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 348-349 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Many times during the last 10 years, Congress has given specific attention to the problems encountered by minority-owned businesses,[16] and has enacted leg-

[16] See, *e.g.*, *Review of Small Business Administration's Programs and Policies—1971: Hearings Before the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. 283-284 (1971); *Government Minority Small Business Programs: Hearings Before the Subcomm. on Minority Small Business Enterprise of the House Select Comm. on Small Business*, 92d Cong., 1st Sess. (1971); *Government Minority Enterprise Programs—Fiscal Year 1974: Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. (1973); *Minority Enterprise and Allied Problems of Small Business: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 1st Sess. (1975), and the related report, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. (1975); *The Effects of Government Regulations on Small Business and the Problems of Women and Minorities in Small Business in the Southwestern United States: Hearing Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. (1976); *Minority Business Development Administration: Hearing Before the Minority Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

islation designed to remedy these problems.[17] When Congress enacted the MBE provision, it was fully aware that as a result of discrimination minorities are represented in disproportionately low numbers in the ownership of businesses[18] and that those few minority-owned businesses that do exist receive a minuscule share of the total gross receipts of American businesses and of the federal, state, and local contract dollar.[19] "Of $2.54 trillion in gross business

[17] We have included, as an Appendix to this brief, additional materials describing the problems encountered by minority-owned businesses as a result of discrimination and the programs Congress has developed in an attempt to remedy the effects of previous discrimination and to prevent discrimination in the future.

[18] In 1976, Senator Javits explained on the floor of the Senate that "while minority persons comprise over 15 percent of the Nation's population only 3 percent of the 13 million businesses in the United States are owned by minority persons." 122 Cong. Rec. 13866 (1976).

[19] Petitioners contend (Pet. Br. 19-20) that "a low representation of minorities can be found only if *both* the pre-1965 and post-1965 periods are taken into account together" and that statistics including the effects of discrimination occurring before 1965, the effective date of Titles VI and VII of the Civil Rights Act of 1964, are legally irrelevant. Petitioners' factual contention is unsupported by any authority and is inconsistent with the statistical data that show that, although there has been some increase in minority participation in business, minorities have been significantly underrepresented in business revenues on a yearly, not just a cumulative, basis. See, *e.g.*, 124 Cong. Rec. E985 (daily ed.

receipts for the nation, about $16.6 billion, or 0.65 percent, of that total was realized by the minorities." 122 Cong. Rec. 34754 (1976) (statement by Sen. Glenn).[20] Less than one percent of the federal contract dollar goes to minority enterprises. See 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke).[21] Referring to this under-

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Mar. 2, 1978) (remarks of Rep. Hamilton); 122 Cong. Rec. 34754 (1976) (statement of Sen. Glenn). See also notes 21 and 24, *infra*.

More important, petitioners' apparent assumption that Congress does not have a legitimate interest in eliminating the effects of discrimination that occurred before 1965 is incorrect. Whether or not the discriminatory practices that hampered the development of minority businesses were illegal before the passage of the 1964 Civil Rights Act (and they may well have violated 42 U.S.C. 1981 and the Thirteenth and Fourteenth Amendments), Congress is empowered to declare the continuing effects of such discrimination unacceptable and to redress the disadvantages that minority businesses still suffer as a result of deliberate exclusion in the past.

[20] See also *Minority Business Development Administration: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 2 (1976) (remarks of Sen. Glenn); H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 124 (1977). The latter report is a summary of the activities of the House Committee on Small Business.

[21] There are few statistics available concerning the amount of state and local contracts going to minority businesses. Firms owned by minority group members received less than seven-tenths of one percent of all contracting dollars spent by those state and local governments that provided data in response to a 1973 United States Civil Rights Commission Survey, the results of which were transmitted to Congress in 1975 (see 42 U.S.C. 1975c(b)). See *Minorities and Women*

representation of minority businesses, a 1975 report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business concluded that

> [T]he effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
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> * * * * *
>
> The presumption must be made that past discriminatory systems have resulted in present economic inequities.

H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 1-2 (1975).

Congress, however, did not need to rely solely on the statistical showing of discrimination against minority-owned businesses. Through many years of hearings and debates on legislation to proscribe discriminatory conduct against minorities, and particularly through past efforts to deal with the problems of minority businesses, Congress has gained considerable experience in identifying and dealing with the effects of discrimination. Congress has learned that "[f]or a complex of historical reasons—lack of capi-

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as Government Contractors, A Report of the United States Commission on Civil Rights 2, 86 (May 1975). The report's findings have been cited by congressional committees concerned with the problems of minority-owned businesses. See, *e.g.*, H.R. Rep. No. 94-468, 94th Cong., 1st Sses. 11 (1975).

tal, exclusions from trades,[22] discrimination by business people and the public—minority business has been concentrated in that part of the market found least profitable by other businesses." [23] Moreover, minority-owned businesses have been excluded from opportunities in the construction industry by the operation of subtle, but nonetheless discriminatory, forces.[24] As the Appendix indicates, the discrimina-

[22] Indeed, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *Steelworkers* v. *Weber*, Nos. 78-432, 78-435, 78-436 (June 27, 1979), slip op. 2 n.1. Like this Court, the lower federal courts are well aware of the pervasive nature of discrimination in the construction industry. See, *e.g.*, *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); *United States* v. *Masonry Contractors Ass'n of Memphis*, 497 F.2d 871 (6th Cir. 1974); *Associated General Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974). See also the cases cited by the district court in the present case dealing with discrimination in New York (A. 198a n.17). Among other consequences, employment discrimination has the effect of blocking at an early stage one leading avenue toward becoming a contractor. See *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338, 356 (D. R.I. 1978).

[23] *The Effects of Government Regulations on Small Business and the Problems of Women and Minorities in Small Business in the Southwestern United States: Hearings Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. 3 (1976) (remarks of Sen. Bartlett); see also *id.* at 18 (statement of Sen. Laxalt).

[24] In 1972, according to Bureau of the Census statistics, the gross receipts for minority-owned firms constituted approximately 1.1% of the total receipts for all firms. 1972 Census

tory practices of nonminority lenders, insurers, contractors, and purchasers, as well as those of federal and state government officials, have excluded minority-owned businesses from available contracting opportunities.[25] These discriminatory practices continue to

of Construction Industries, *United States Summary—Statistics for Construction Establishments With and Without Payrolls*, Table A1 (August 1975); 1972 Survey of Minority-Owned Business Enterprises, *Minority-Owned Businesses*, Table 1 (May 1975) (hereinafter "Summary Volume"). Available data indicate that the total number of minority-owned firms (which in some circumstances may include more than one establishment) in the construction industry is approximately 4.3% of the total number of establishments in the construction industry. 1972 Census of Construction Industries, *United States Summary—Statistics for Construction Establishments With and Without Payrolls*, Table A1 (August 1975); 1972 Survey of Minority-Owned Businesses, *supra*. Summary Volume, Table 1. Similarly, the total number of minority-owned firms (which may in some instances include more than one establishment) in the heavy construction industry is approximately 2.3% of the total number of establishments in the heavy construction industry and this group receives only 0.3% of the total receipts for heavy construction work. 1972 Census of Construction Industries, *United States Summary—Statistics for Construction Establishments With and Without Payrolls*, Table A1 (August 1975); 1972 Survey of Minority-Owned Business Enterprises, *supra*, Summary Volume, Table 1.

As used in the Census statistical tables, the term "minority" includes, blacks, persons of Spanish-origin, and persons of Asian American, American Indian, or other ancestry. 1972 Survey of Minority-Owned Business Enterprises, *supra*, Summary Volume at 1.

[25] Petitioners erroneously assert (GBC Br. 14) that a 1975 Report of the United States Civil Rights Commission, Minorities and Women as Government Contractors (May 1975), "does not list discrimination as an obstacle to minority business enterprise participation in federal procurement programs". This assertion is incorrect. See *id.* at 21 and 107.

limit the opportunities available to minority-owned businesses because they deny minority-owned businesses the credentials needed for success in the business community.

Nonminority lenders and insurers make subjective evaluations of the credit-worthiness and insurability of minority owned firms. See App., *infra*, 5a-6a, 17a-20a. Because minority-owned firms have often been discriminated against in their efforts to obtain loans and bonding, nonminority lenders and insurers often deny the applications of minority-owned businesses on the ground that they do not have a sufficient credit-rating or record of success.

Similarly, minorities seeking to obtain contracts as suppliers or subcontractors are often precluded from obtaining employment because of the effects of prior discrimination. Although prime contracts for government funded construction projects are normally let by a competitive bidding process, contracts for supplies and subcontracts for construction work are often let through the subjective process of negotiated contracts. Because minority-owned businesses have been precluded by previous discrimination from gaining experience as contractors and suppliers in the construction industry, many nonminority contractors have no experience in dealing with minority-owned businesses. As a result, nonminority-owned businesses are unlikely to contract with minorities. As the testimony at trial demonstrates, established contrac-

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Moreover, petitioners offer no rational explanation for the low level of minority participation in the construction industry that would rebut the inference that minorities have been excluded by discrimination and its lingering effects.

tors are frequently unfamiliar with the abilities of minority-owned businesses and are reluctant to contract with firms that do not have a known "track record" (A. 65a, 81a, 86a, 89a-91a). See App., *infra*, 16a-18a.

Recognizing the problems encountered by minority-owned businesses, Congress has enacted a number of measures designed to aid minority contractors and subcontractors and to insure that federal programs do not have the effect of excluding minorities. See, *e.g.*, Section 8(a) of the Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 389, 15 U.S.C. 637(a). By the time Congress considered the Public Works Employment Act of 1977, however, neither previous legislative efforts, nor parallel efforts by the Executive,[26] had had a substantial impact on the prospects of minority-owned businesses. Nor had antidiscrimination provisi ns such as 42 U.S.C. 1981 and Title VI of the Civil Rights Act of 1964 been successful in eliminating prejudice against such firms. In November 1976 the House Committee on Small Business described the problems still encountered by minority businesses in the following way (H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 182-183 (1977)):

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[26] Exec. Order No. 11,458, 34 Fed. Reg. 4937 (1969), as amended by Exec. Order No. 11,625, 36 Fed. Reg. 19967 (1971), established the Office of Minority Business Enterprise within the Department of Commerce. The Office is charged with the responsibility for devising programs and coordinating inter-agency activities to encourage development of minority enterprises. Federal procurement regulations also require all federal agencies to ensure that businesses dealing with the government take efforts to extend contracting opportunities to minority business enterprises. 41 C.F.R. 1-1.1302.

> The very basic problem * * * is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular. However, inroads are now being made and minority contractors are attempting to "break-into" a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them.

Thus, in the face of earlier failures, Congress was aware of the need to develop a program that would insure that the four billion dollars to be appropriated in Round II of the local public works program would not be used to carry forward the effects of discrimination. Although the legislative discussion of the MBE provision is sparse because the provision was proposed as an amendment during floor debate, the contemporaneous evidence fully supports the conclusion that the provision was intended to remedy the effects of discrimination against minority businesses. When the 1977 legislative materials are viewed in light of Congress' previous efforts to accomplish the same purpose, it is indeed "difficult to imagine" (A. 216a) that Congress had anything

else in mind when it added Section 103(f)(2) to the Public Works Employment Act.

On Friday, February 4, 1977, the final day of hearings in the House on H.R. 11, the bill that became the 1977 Act, the subcommittee received testimony from the Michigan Advisory Committee to the United States Commission on Civil Rights. *To Amend and Extend the Local Public Works Capital Development and Investment Act: Hearings before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 808-835 (1977). Jo-Ann Terry, the chairperson of the Advisory Committee, reported on the Committee's "findings regarding the racial impact of the December 1976 local public works project selections in Michigan" (*id.* at 809). On the basis of data received from the Economic Development Administration only a few days earlier, the Committee concluded that "among those jurisdictions funded, those with few minorities received significantly more local public works funding per capita than did those jurisdictions with high minority populations" (*ibid.*). Terry told the House subcommittee that, at least in Michigan and perhaps in other states as well, "the purposes of Congress have been distorted by the EDA's project selections" in implementing Round I of the local public works program (*id.* at 810). Terry charged that the program, intended to provide long-term benefits through capital improvements, had been

"distorted so that it is literally setting discrimination in concrete" (*ibid.*).[27]

In response to the testimony from the Michigan Advisory Committee, Representative Conyers asked the subcommittee's permission to review the materials suggesting the existence of racial discrimination in the distribution of project funds and then to discuss the matter with the subcommittee. Subcommittee Chairman Roe agreed (*Hearings*, at 837) to allow Representative Conyers to meet with the subcommittee after the upcoming weekend and to express his views concerning the Michigan data at that time. On Monday, February 7, 1977, Representative Conyers appeared before the subcommittee to comment on the evidence of "the racially discriminatory impact of public works grants in the state of Michigan" (*id.* at 937). After discussing some of the probable reasons for the disproportionate distribution of 1976 project funds to communities with low minority populations (*Hearings*, at 937-938), Representative Conyers informed the subcommittee that he had been "contacted by individuals who believe that minorities and women have been deprived of employment and contracting opportunities on LPW-funded projects" (*id.* at 939). Representative Conyers stated that he had not had time to investigate the allegations but that "the historical pattern of discrimination within the construction industry lends credence to their charges" (*ibid.*). He promised to study the subject further and, if it appeared that minorities and women did suffer discrimination under Round I of the local public works program, to propose an amendment to strengthen the nondiscrimination provisions in Title VI of the 1964 Civil Rights Act and in Section 110 of the 1976 Local Public Works Act, 42 U.S.C. 6709.

Two and a half weeks later, during floor debate on H.R. 11, Representative Mitchell moved to amend the bill by adding a minority business enterprise provision very similar to the one ultimately enacted into law. 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977).[28] He explained (*ibid.*) that "all this amend-

[27] Frank Steiner, a staff representative of the Civil Rights Commission who accompanied Terry at the hearing, testified (*Hearings*, at 830) that

> it is traditionally and generally understood that unemployment rates among minority groups have been generally twice what they have been among whites, and particularly so in areas that are all minority or predominantly minority.
>
> So we would assume that the level of statistical significance of these correlations between LPW funding levels and minority percent of population would probably be another order of magnitude more significant, and doubled perhaps, if based on unemployment data as base data.

Steiner also stated that the bias identified by the Michigan Advisory Committee was a racial one, not one based on the urban or rural character of the funded areas or the size of the areas' population. "It is clearly race and it is statistically significant as race," Steiner said (*ibid.*).

[28] As initially introduced, the provision stated:

> Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the dollar volume

ment attempts to do is to provide that those who are in minority businesses get a fair share of the action from this public works legislation." Representative Mitchell also described how the 10% set-aside would complement existing federal efforts to aid minority businesses. He stated (*id.* at H1436-H1437):

> We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, "We will create you on the one hand and, on the other hand, we will deny you." That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent—1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA

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of each contract shall be set aside for minority business enterprise and, or [*sic*], unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

> and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts.

Characterizing the MBE provision as "the only way we are going to get the minority enterprises into our system," Representative Mitchell urged that his amendment be adopted, "because to the extent we are willing to let minorities do business with the government, we will be able to reduce survival support programs now paid for by the Federal Government" (*id.* at H1437). He concluded by stating that the minority set-aside was designed "to begin to redress this grievance that has been extant for so long" and "to give [local political subdivisions] the added impetus to do those things which are right and fair" (*id.* at H1440).

Representative Biaggi spoke in support of the Mitchell amendment. He stated (123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977)):

> This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been disolved [*sic*] in a period of economic recession.
>
> * * * * *
>
> [W]ithout adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense

> of economic parity. This amendment will go a long way toward helping to achieve this parity and more importantly to promote a sense of economic equality in this Nation.

Representative Conyers added (*ibid.*) that "minority contractors and businessmen who are trying to enter in on the bidding process * * * get the 'works' almost every time. * * * The sad fact of the matter is that minority enterprises usually lose out, and * * * through no fault of their own simply have not been able to get their foot in the door." See also *id.* at H1423 (remarks of Rep. Stokes).

The House agreed to the proposed MBE provision after amending it to make clear that the Secretary of Commerce was authorized to waive the 10% minority requirement in project areas where sufficient minority contractors and material suppliers were not available (123 Cong. Rec. H1437-H1438 (daily ed. Feb. 24, 1977)). The amended version of Representative Mitchell's proposal also specified that "10 percent of the amount of each grant shall be expended for minority business enterprises"; this language was substituted in place of the requirement in the original version of the MBE provision that 10% of "the dollar volume of each contract" should be set aside for minority businesses and 10% of the "article, materials and supplies" used in each project should be procured from such firms (*ibid*; see note 28, *supra*). Later the same day, the House passed H.R. 11 (123 Cong. Rec. H1461-H1462 (daily ed. Feb. 24, 1977)).

During the Senate's consideration of its version of the 1977 Public Works Employment Act, Senator Brooke moved to amend the bill by adding a provision requiring that 10% of the "articles, materials and supplies" used in any local public works project be procured from minority business enterprises. 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977). In support of the amendment, Senator Brooke stated that such a provision is "a legitimate tool to insure participation by hitherto *excluded* or unrepresented groups" (*ibid.*; emphasis added). The Senator also said that the 10% set-aside measure was necessary "because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool" (*ibid.*). Senator Brooke's amendment was adopted and included in S.427 as it passed the Senate (*id.* at S3910, S3926-S3929).

Without commenting on the matter, the Conference Committee adopted the House version of the MBE provision. S. Conf. Rep. No. 95-110, 95th Cong., 1st Sess. (1977); H.R. Conf. Rep. No. 95-230, 95th Cong., 1st Sess. (1977). The Senate and the House passed the bill as reported by the Conference Committee, and Representative Mitchell's proposal became law. 123 Cong. Rec. S6755-S6757 (daily ed. Apr. 29, 1977); *id.* at H3920-H3935 (daily ed. May 3, 1977).

The limited legislative history of the MBE provision thus shows that the measure was intended to en-

sure that minority businesses would not be excluded from the benefits of the 1977 public works program solely on the basis of past obstacles to minority entry into the construction industry. Although the reasons for the restricted opportunities available to minority contractors before 1977 and the disproportionately small participation of minority businesses in the national economy were not rehearsed in the committee reports or floor debates, Congress was fully aware of the background of discrimination that had affected and continued to affect both the construction industry and many other segments of the American economy. The tone of the floor discussion, as well as Representative Conyer's reference in the House hearing to "the historical pattern of discrimination within the construction industry" (see page 45, *supra*), bears witness to Congress' familiarity with the problem of discrimination against blacks and other minorities. Congress' recognition of the debilitating impact of discrimination on the prospects of minority-owned businesses is amply demonstrated not only by the very fact of Section 103(f)(2)'s inclusion in the 1977 Act but also by the history of previous congressional efforts to prevent such discrimination and to remedy its effects. Petitioners do not contend that this discrimination did not occur, and indeed they offer no satisfactory explanation for the dismal share of construction contracting work performed by minority firms. In light of the full legislative background, the congressional purpose emerges with clarity. As the Third Circuit held in *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, *supra*, 573 F.2d at 817 (footnotes omitted), the MBE provision

> was designed to "begin to redress" what Congress perceived to be the continuing economic impact of racial discrimination. Such a purpose might well be sufficient to allow the legislature to take notice of findings by the government in other aspects of the national anti-discrimination effort to the effect that minority contractors labor under handicaps requiring remedial action. Moreover, the debates in connection with the MBE set-asides evidence a Congressional determination that other attempts to encourage minority businesses have not proved successful.[29]

C. The MBE Provision Is A Constitutionally Permissible Means By Which Congress May Seek to Eliminate The Effects of Discrimination in the Construction Industry

1. In responding to the second part of petitioners' attack on the minority business enterprise provision, we again begin by emphasizing the special role of Congress in developing appropriate remedial measures to redress the effects of past racial and ethnic discrimination. This Court recognized long ago in *Mc-*

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[29] The congressional determination that more concrete remedial measures are required is shared by the Executive Branch. President Carter has directed that expanded efforts be made by all federal agencies to strengthen minority business development through increased federal deposits in minority-controlled banks and by encouraging greater participation of minority-owned enterprises in supplying the government's procurement needs. See 13 Weekly Comp. of Pres. Doc. 511 (Apr. 8, 1977); *id.* at 1333 (Sept. 12, 1977).

Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819), that when Congress exercises its powers under the Constitution, its determination concerning the need for legislation and the proper method of accomplishing legislative goals is entitled to substantial deference. This general principle applies with particular force when Congress acts to enforce the guarantees of the Civil War Amendments. Those Amendments, through their explicit grant of legislative enforcement power, authorize Congress "to exercise its discretion in determining whether and what legislation is needed" to eliminate present discrimination and the continuing effects of past discrimination. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 651.

The framers of the Civil War Amendments wisely entrusted this enforcement responsibility to Congress. In our system of separation of powers, Congress is the branch of government best suited to determine whether broadly applicable remedial action is needed and, if so, what legislative measures are most appropriate in light of all the relevant considerations. Congress' special ability to gather and evaluate a wide range of factual information provides an immeasurable advantage in the formulation of remedial measures that are likely not only to achieve their immediate objectives but also to do so without jeopardizing other important values. See Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106-107 (1966).

In redressing the effects of discrimination against minorities, for example, Congress is the body best

able to devise meaningful forms of relief for victimized groups while at the same time accommodating the legitimate interests of persons who have neither discriminated nor suffered discrimination and who claim an entitlement to government benefits. Congress' role as the most representative of the three branches of government makes it the appropriate forum in which to balance these competing interests.

Moreover, a legislative compromise, once reached, endures only as long as a more desirable solution to the particular problem at hand does not commend itself to a majority of Congress. Congressional efforts to remedy discrimination therefore possess the dual virtue of being both the best available approximation of majority will at the time of enactment and readily subject to modification or discard in light of increased experience or changed circumstances. See Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 28-29 (1975).

For these reasons, courts reviewing the constitutionality of legislation intended to further the purposes of the Civil War Amendments should be reluctant to disturb the balance struck by Congress. The rule of "presumptive invalidity" advocated by petitioners (Pet. Br. 9-10) is inappropriate. When Congress seeks to remedy the effects of discrimination, a statutory racial classification should be sustained if Congress has reason to believe that such a measure is necessary to accomplish the legislative goal and if the statute is designed to moderate the adverse effects of the classification on persons argu-

ably not involved in past discrimination. Such a standard recognizes Congress' special role under the Civil War Amendments and preserves the flexibility that the Legislative Branch needs to carry out its constitutional responsibilities.

2. Congress properly determined that the 10% minority set-aside provision in the Public Works Employment Act of 1977 was necessary to ensure that the effects of discrimination in the construction industry would not be carried forward in projects funded under the Act. Previous legislative measures to prohibit the kinds of discrimination that have occurred in the industry and to eliminate the effects of such discrimination in federally funded programs had not succeeded in achieving their goals. The antidiscrimination provisions in 42 U.S.C. 1981, Titles VI and VII of the Civil Rights Act of 1964, and the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) had made little progress, by 1977, toward increasing the participation of minority business enterprises in the national economy, and the results in the construction industry had been particularly disappointing. Specific legislation enacted to help minority-owned businesses obtain financing and bonding (see, *e.g.*, 15 U.S.C. 694a and 694b) had been similarly ineffective. When Congress enacted the MBE provision, the available information all confirmed that the role of minority businesses in the construction industry and in federal, state, and local contracting generally was extraordinarily small.

Moreover, because the primary objective of the

1977 Act was to stimulate the economy by quickly introducing four billion additional dollars in federal funds into the construction industry, Congress could not afford to wait until the existing statutes for the benefit of minority businesses had produced their intended results. In order to achieve its economic goals, Congress had to act with dispatch. The need for haste is evidenced by the statutory provisions requiring the appropriated funds to be distributed on an expedited basis.[30]

In light of the speed with which the local public works program was to be implemented, Congress recognized that some special measure was necessary to ensure that minority firms would participate significantly in the benefits to be derived from the federal funds. Prospective antidiscrimination provisions

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[30] The appropriations acts for the funds authorized in 1976 and 1977 both required that the federal monies be committed to state and local grantees by September 30, 1977, the end of fiscal year 1977. 90 Stat. 1497; 91 Stat. 122. The 1977 Act provided that, with certain limited exceptions, the grantees that would receive the newly authorized four billion dollars should be selected on the basis of applications filed by December 23, 1976, *i.e.*, applications filed under Round I of the local public works program. 42 U.S.C. (Supp. I) 6707(h); 13 C.F.R. 317.30. In addition to relying for the most part on existing applications in order to avoid the delay entailed in the preparation of new ones, Congress retained the provision in the 1976 Act that required the Secretary to "make a final determination with respect to each application * * * not later than the sixtieth day after the date he receives such application." 42 U.S.C. (and Supp. I) 6706; 13 C.F.R. 317.74(e). Finally, Congress also retained the requirement that each applicant give satisfactory assurance that on-site work would begin within 90 days of project approval. 42 U.S.C. 6705(d).

and government loan or bonding assistance were not good enough; they simply could not produce meaningful change within the time limits of the public works program. Without some positive legislative action to guarantee a place for minority contractors in funded project construction, minority firms would have been largely excluded from the local public works program and the effects of past discrimination in the industry would have been perpetuated and reinforced. In these circumstances, Congress had little choice but to adopt a statutory provision directly addressed to the subject of minority participation in the contracting work that would be generated by the newly authorized federal grants. Rather than affirmatively compelling nonminority contractors to change their subcontracting practices (cf. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425), Congress offered them a substantial incentive to do so. Prime contractors willing to agree with state and local grantees that, where possible, 10% of project funds would be expended "for minority business enterprises" thereby became eligible to reap the financial benefits of participation in the federally funded public works program. The MBE provision, in short, was a reasonable, narrowly focused legislative response to a difficult problem that could not have been solved in any other way, given the temporal constraints within which Congress was forced to operate in order to achieve its economic aims.

Nor is the MBE provision subject to criticism on the ground that the benefited group may include

some persons who were not themselves the victims of discrimination. Especially in light of the substantial time pressure, a general rule like the 10% minority set-aside was the best that Congress could devise. Moreover, even if additional time had been available, Congress cannot perform the role that a court plays in identifying individual victims of discrimination in individual lawsuits. The nature of the legislative process requires that Congress act by reference to categories of persons, and statutes are not unconstitutional merely because their beneficiaries include some persons not as deserving as the ones Congress sought to assist. See *Gaston County* v. *United States*, *supra*; *Oregon* v. *Mitchell*, *supra*, 400 U.S. at 147 (opinion of Douglas, J.); *id.* at 216 (Harlan, J., concurring in part and dissenting in part); *id.* at 233-236 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part); *id.* at 284 (Stewart, J., concurring in part and dissenting in part); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 177 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). Cf. *Califano* v. *Webster*, *supra*.[31]

[31] This is not a case like *Craig* v. *Boren*, 429 U.S. 190, 198 (1976), in which a gender classification was used as an inaccurate proxy for other, more precise categories that the legislature could have employed to achieve its legitimate goals. Here, minority status is not a substitute but is the only classification that can be used, because the congressional objective in enacting the MBE provision was the elimination of the effects of past discrimination. Cf. *Califano* v. *Webster*, *supra* (gender-based classifications upheld where utilized to remedy the effects of gender-based discrimination).

3. Congress designed the MBE provision so that it would have no more than a minimal adverse effect on nonminority contractors arguably not responsible for discrimination in the construction industry. This Court has recognized that, in order to remedy the wrongful exclusion of minorities from economic and social benefits, some "sharing of the burden of the past discrimination" may be necessary. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976). Even the most carefully tailored remedial measure may sometimes have an adverse impact on the legitimate interests of nonminorities. *United Jewish Organizations* v. *Carey, supra; Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 366 n.41 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).[32] This alone does not render a racial classification unconstitutional. Rather, when Congress uses race or ethnic background as a distinguishing factor in an effort to eliminate the effects of present or past discrimination, the critical inquiry is whether the means chosen to accomplish the legislative goal strike an acceptable balance between the nonminority interests at stake and the need

[32] Mr. Justice Powell also concluded in *Bakke* that a university could properly take race into account in its admissions policy in order to promote diversity within the academic community. Thus, a majority of the Court has agreed that a race-conscious program is not unconstitutional solely because it has some adverse effect on nonminorities—who necessarily would be disadvantaged to some extent by an admissions program that considered race as a positive factor, regardless of the reasons for that policy.

for an effective remedial measure. Cf. *Steelworkers* v. *Weber, supra*, slip op. 12-13; *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 369-379 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The MBE provision in the Public Works Employment Act of 1977 properly accommodates the competing interests of minority and nonminority businesses. It ensures meaningful minority involvement in the construction of federally funded public works projects and at the same time imposes only a very limited disadvantage on nonminority contracting firms.

As the court of appeals concluded (A. 221a), the MBE provision "extends to only .25 percent of funds expended yearly on construction in the United States * * * [and] the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry."[33] The

[33] The court of appeals' calculation of the percentage of total annual construction work represented by minority participation in the public works program should be viewed as an approximation, not an exact finding. The 0.25% figure appears to be based on the assumption that precisely 10% of the funds appropriated under the 1977 Act, or 400 million dollars, were spent for minority business enterprises. In fact, of course, minority contractors participating in some public works projects received more than 10% of the total project grant, while other projects did not involve any minority participation because the unavailability of qualified minority contractors in the appropriate market areas led to the application of the Secretary's waiver rule. See page 62, *infra*. Similarly, the court of appeals' calculation of the percentage

program does not foreclose any nonminority firm from competing with minority firms. Contrary to petitioners' assertion (Pet. Br. 24), the effects of the MBE provision are not concentrated in any identifiable nonminority group. Nonminorities are not excluded from any particular 10% of the funded work. The minority business requirement may be satisfied by a grantee's entering into a prime contract with a minority firm or by a prime contractor's letting subcontracts or supply contracts to minority firms for any portion of the project work or materials. Thus, in competing for each contract, a nonminority bidder is not "foreclosed from all consideration * * * simply because he was not the right color or had the wrong surname." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 318 (opinion of Powell, J.). Nor does the program operate "to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group." *Id.* at 374 (opinion of Brennan, White, Marshall and Blackmun, JJ.).[34]

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of minority businesses in the construction industry is also a reliable but inexact approximation. See note 24, *supra*.

[34] The Pacific Legal Foundation, in its brief as amicus curiae (Amicus Br. 17-21), contends that the MBE provision is an illegal bill of attainder because it singles out nonminority contractors for punishment. This contention was not presented to the courts below or in the petition for a writ of certiorari, and therefore is not properly before this Court. See, *e.g.*, *General Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938); *Lawn* v. *United States* 355 U.S. 339, 362 n.16 (1958). In any event, because the MBE requirement can be satisfied by any service, supply, or construction contract and does not foreclose any nonminority contractor from continuing in business or from bidding on any contract let under the local public works program, Section 103(f)(2) is not "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 474 (1977). Moreover, because of the important remedial purposes served by the MBE provision, it is clear that "viewed in terms of the type and severity of burdens imposed," the statute "reasonably can be said to further nonpunitive legislative purposes." For that reason, it is not a bill of attainder. *Id.* at 475-476.

While some nonminority firms may lose some contracts because of the operation of the MBE provision, they are not foreclosed from operating their businesses.[35] They do not suffer the same kind of exclusion from their desired occupation as that suffered by the plaintiffs in *Regents of the University of California* v. *Bakke*, *supra*, and *Steelworkers* v. *Weber*, *supra*. The MBE provision, which assures minority participation in one, temporary, federally financed state and local public works program, affecting only one sector of the construction industry, does not entail any total exclusion of nonminorities.

Nonminorities have lost no right or legitimate expectation by the addition of Section 103(f)(2) to the 1976 Act. Cf. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 657. If Congress had not established the 1977 public works program or had omitted the MBE provision from the new authorization but appropriated 10%

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[35] Indeed, no nonminority plaintiff testified that it had lost a contract as a result of competition with minority contractors.

less money, nonminority contractors would not have benefited in any way.

Moreover, the waiver procedure authorized by the statute and implemented by the Secretary's regulations and guidelines ensures flexibility.[36] The availability of a waiver depends on three factors: (1) the number of qualified minority-owned businesses in the relevant area that are available to perform project work or provide necessary supplies; (2) proof of good-faith efforts by a grantee and prime contractor to find and use such businesses; and (3) the size of the area's minority population (A. 165a-167a).[37] These criteria

[36] Under internal directives issued by the Economic Development Administration, the Secretary considers additional criteria in those cases in which state or local grantees originally report minority firm contracts sufficient to comply with the MBE provision, but during the course of construction some of the expected minority participation fails to occur. If the reduced minority participation is caused by the inability of the minority firm to complete its contract, the Secretary also considers: (1) the reasons the firm could not complete performance; (2) the extent of assistance provided to the firm by the grantee or prime contractor, such as aid in obtaining bonding or working capital or in meeting union requirements; and (3) the extent of efforts to obtain a substitute minority contractor. If, however, the reduced participation is caused by the Secretary's determination that a firm is not a *bona fide* minority enterprise, the additional criteria are (1) whether the grantee or prime contractor reasonably believed the enterprise was an MBE; and (2) the extent of efforts to obtain a substitute minority firm.

[37] We are informed by the EDA that 1261 waivers were granted as of September 9, 1979, under Round II of the local public works program. Seven of these were granted in connection with projects for which respondent New York State was the grantee, and six were granted in connection with projects for which the grantee was respondent New York City.

are similar to those employed in setting goals for enforcement of the affirmative action requirements of Exec. Order No. 11246.[38]

Because the 1976 and 1977 Acts established a *nationwide* program for the construction, modification, and repair of local public works, Congress needed to adopt a general rule for the benefit of minority businesses. Detailed comparative statistics on business ownership are not available on a local basis,[39] and in any

[38] 30 Fed. Reg. 12319 (1956), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14303 (1967), and Exec. Order No. 12,086, 43 Fed. Reg. 46501 (1978). Under these Executive Orders, federal contractors are directed to consider a series of eight factors in "determining whether minorities are being underutilized in any job group * * *." 41 C.F.R. 60-2.11 (b) (1). The factors include:

> (i) The minority population of the labor area surrounding the facility;
>
> (ii) The size of the minority unemployment force in the labor area surrounding the facility;
>
> (iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;
>
> (iv) The general availability of minorities having requisite skills in the immediate labor area;
>
> (v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;
>
> (vi) The availability of promotable and transferable minorities within the contractor's organization;
>
> (vii) The existence of training institutions capable of training persons in the requisite skills; and
>
> (viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

[39] See, *e.g.*, Civil Rights Commission Report, *supra*, note 21, at x.

event Congress could not have hoped to anticipate all the variations that the Secretary would encounter in administering the public works program. Recognizing that the general 10% rule might not be appropriate for certain projects or certain locations, Congress delegated to the Secretary the task of adapting the minority set-aside requirement to specific situations that arose in the course of the program's administration. The Secretary discharged this responsibility through the waiver procedure, and petitioners do not contend that waivers were unfairly denied.

The short-term emergency nature of the public works program, the lack of any total exclusion of nonminority contractors from competition for any particular contract, and the availability of the waiver procedure all serve to distinguish the 10% minority set-aside from the medical school admissions procedure rejected by a majority of the Court in *Bakke*. The short-term nature of the program meant that the impact of the MBE provision was limited from its inception. Whatever the successes or failures of the 10% set-aside, the measure was only temporary and Congress would have been obliged to review the record and legislate again before the provision's effective period could have been extended. In addition, although the 10% MBE requirement had to be satisfied with respect to each public works project viewed as a whole, the lack of any total exclusion of nonminority businesses meant that, on any given contract, a grantee or prime contractor could prefer a nonminority bidder if it regarded that bidder as superior to

qualified minority bidders. Finally, the MBE provision imposed no obligation to spend federal funds on minority businesses, regardless of their qualifications. The availability of the waiver procedure meant that, where qualified minority firms could not be located in the applicable project area, the 10% set-aside requirement would not be enforced and public works construction could proceed unhampered by an impractical requirement that funds be expended for nonexistent or unqualified minority firms.

Petitioners contend (Pet. Br. 26-27; GBC Br. 24-31), however, that the MBE provision is unconstitutional because Congress could have found other means of aiding minority businesses that would have been "less drastic." Petitioners suggest, for example, that a minority education and training program or a minority bonding program would have been a "less drastic" means of remedying the effects of discrimination against minority businesses. But petitioners wholly fail to demonstrate why such programs would be "less drastic" in a constitutional sense. All of the alternative approaches recommended by petitioners would require the use of race or national origin as a selection criterion. Petitioners' programs therefore could not be distinguished, in any principled way, from the MBE provision they deplore. The proposals would be "less drastic" only in the sense that any adverse effect on nonminority groups would be more likely to fall on persons and businesses that are not members of petitioner associations—for example, nonminority contractors in need of special financing help

or training to gain entry into the construction industry.

A slightly different approach, also preferred by petitioners (GBC Br. 29-31), is that embodied in the recent revision of Section 8(d) of the Small Business Act, 15 U.S.C. 637(d). The new version of Section 8(d) (added by Section 211 of the 1978 amendments, Pub. L. No. 95-507, 92 Stat. 1767-1770) declares it to be the policy of the United States that "small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." Government prime contractors must agree to cooperate with this policy, "to the fullest extent consistent with the efficient performance" of their contracts, by awarding subcontracts to firms controlled by "socially and economically disadvantaged individuals." Although prime contractors are directed to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, and other minorities," petitioners maintain (GBC Br. 29-31) that the program established by the recent amendments is preferable to the MBE provision because other individuals found to be disadvantaged are eligible.[40]

[40] See Section 201 of the amendments, adding a new Section 2(e) to the Small Business Act (92 Stat. 1760; to be codified in 15 U.S.C. 631(e)) (congressional finding that many persons are socially and economically disadvantaged "because

Petitioners' argument misses the point. In enacting the MBE provision, Congress chose a race-conscious method to remedy discrimination against minorities and to prevent its effects from being perpetuated in one short-term federal grant program. The Small Business Act amendments, by contrast, are designed to achieve a broader, long-range legislative goal. Of course, this is not to say that Congress abandoned its concern for minorities when it enacted the 1978 amendments. Indeed, that concern is explicitly reflected in the new statute.[41] But Congress went considerably further and established a continuing program intended not only to remedy discrimination against minority-owned businesses but also to increase the participation of businesses owned by disadvantaged persons in federal procurement projects. When Congress enacted the MBE provision, it could reasonably have concluded that a program open to all disadvantaged persons would have been unlikely to accomplish the primary objective of preventing the exclusion of minorities from the short-term public works program.[42] Cf. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 376 (opinion of Brennan, White, Marshall and

of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control").

[41] A more detailed description of Pub. L. No. 95-507 may be found in App., *infra*, 8a-9a.

[42] Indeed, as the district court remarked (A. 200a), all construction contractors might have considered themselves economically disadvantaged in 1977 because of the depressed state of the construction industry.

Blackmun, JJ.). Furthermore, in framing remedial legislation, Congress was not, as petitioners appear to contend, required to include all persons in economic need who might legitimately have derived benefits from the public works program. Congress could reasonably limit its 10% set-aside plan to the groups that had suffered racial and ethnic discrimination. Cf. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 657; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).[43]

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[43] Similarly, petitioners' argument (GBC Br. 19-21) that the MBE provision is unconstitutional because a 1979 Comptroller General's Report identified a number of problems that arose during implementation of the provision is neither legally relevant nor factually accurate. The constitutionality of an Act of Congress must be judged by the information available at the time the statute was passed, not on the basis of an ex post facto analysis of the program's successes or failures. Moreover, although the Comptroller General's report, entitled *Report To The Congress: Minority Firms in Local Public Works Projects—Mixed Results* (January 16, 1979), did identify a number of problems that had arisen in connection with the MBE provision and its implementation (*id.* at 16-38), it also concluded that (*id.* at 7):

> Minority firms' share of Federal funds under the second round of the LPW [*i.e.*, local public works] program was substantial compared with the results of past Federal attempts to bring the minority business sector into the economy's mainstream. EDA did not have to extend the start of construction for many projects, and only about one of every five projects had construction delays because of difficulties with using minority firms. Thus, a primary purpose of the minority provision—to give more Federal funds to minority firms—was achieved without significant delays to the start of LPW projects.
>
> * * * * *
>
> Other benefits resulted from using minority firms on public works projects. New minority firms were established, and existing firms gained experience. Some prime contractors found that minority firms performed adequately and would be given the opportunity to compete on future subcontract work. In addition, minority firms which obtained contracts on LPW projects were able to provide employment for minority workers.

D. The Minority Business Enterprise Provision Does Not Violate Title VI Of The Civil Rights Act of 1964

Petitioners are incorrect in their argument that a statute enacted by Congress in 1977 conflicts with another federal statute passed 13 years earlier and therefore must fall. The MBE provision and Title VI of the Civil Rights Act are far from irreconcilable. As one court has said in rejecting the contention now advanced by petitioners, "there is no inherent inconsistency between a requirement that contracting be done without discriminatory consideration of race and a requirement that every good faith effort be used to achieve minority participation pursuant to legislative mandate in grant funds." *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936, 954 (W.D. Pa. 1977), aff'd, 573 F.2d 811 (3d Cir. 1978). Congress has given no indication that the two statutes are incompatible. On the contrary, by incorporating the enforcement procedures of Title VI into the 1976 Act's provision forbidding sex discrimination in the local public works program (42 U.S.C. 6709), a provision retained without change after the 1977 amendments, Congress showed that it did not perceive any disharmony between the two statutes. In the absence of some evidence that Congress itself recognized a tension between the MBE provision and Title VI, the teaching of this Court in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974), must

control. *Mancari* held that "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed intention to the contrary, to regard each as effective."

Even if there were a conflict between the general provisions of Title VI and the specific MBE provision at issue here, that conflict should be resolved in favor of the later-enacted statute, the Public Works Employment Act of 1977. See *Araya* v. *McLelland*, 525 F.2d 1194, 1196 (5th Cir. 1976). Moreover, as *Mancari* also pointed out (417 U.S. at 550-551), "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The following materials are intended to supplement the summary discussion in the body of the brief (pages 34-42, *supra*) concerning the problems encountered by minority businesses and the legislative and administrative response to those difficulties. Taken together, the materials establish beyond any doubt that the Congress that enacted the MBE provision was acutely aware of the disadvantages under which minority contracting firms have labored and continue to labor. The materials also show that Congress believed that the disadvantages are at least in part the result of discrimination in the construction industry and in the economy generally. Finally, the materials demonstrate that the 10% minority set-aside provision was adopted in connection with the local public works program only because Congress recognized that existing measures designed to aid minority businesses were unlikely to ensure that minority contractors would not be unfairly excluded from participation in the benefits of the authorized federal funds.

The Appendix begins with some further statistics concerning the disadvantaged position of minority businesses and minority group members generally in the national economy. We then list and describe briefly some of the many legislative and administrative measures that have been designed to assist minority businesses but that do not include any requirement that a specific percentage of generally available federal benefits be received by minority firms. Fin-

ally, we reproduce a series of statements by various Members of Congress, all of which reflect the legislative recognition of the role played by discrimination in retarding the growth of minority businesses.

Additional Statistical Information

In those industries that sell and produce supplies and equipment for construction, minority-owned firms are even less well represented than they are in the economy generally or in the construction industry taken as a whole (see note 24, *supra*). Minority-owned firms (which may include more than one establishment) in the wholesale trade industry account for only 1.9% of the total number of business establishments and only approximately 0.3% of the gross receipts. 1972 Census of Wholesale Trade, Volume I, *Summary and Subject Statistics*, Table 1 (Aug. 1976); 1972 Survey of Minority-Owned Business Enterprises, *Minority-Owned Businesses*, Table 1 (May 1975) (hereinafter "Summary Volume"). In the manufacturing industry, only 3.5% of the total number of firms are minority-owned. 1972 Census of Manufacturers, Volume I, *Subject and Special Statistics*, Table 3 (Aug. 1976); Summary Volume, Table 1.

Within the wholesale trade industry, minority-owned firms (which may include more than one establishment) dealing in construction, mining, logging, and road maintenance equipment constitute only 0.6% of the total number of establishments and they draw only 0.1% of the total sub-industry receipts. 1972

Census of Wholesale Trade, Volume I, *Summary and Subject Statistics*, Table 1; Summary Volume, Table 1. In the manufacturing industry, only 0.6% of all firms producing construction, mining, and materials-handling machinery and equipment are minority-owned firms. 1972 Census of Manufacturers, Volume I, *Subject and Special Statistics*, General Summary Table 3; Summary Volume, Table 1.

The effects of discrimination against minorities are of course, not limited to the construction industry. Most of this country's racial and language minorities remain poorer and less educated and suffer greater unemployment than the white majority. For example, in 1969 the percentage of families with incomes below the poverty level was 3½ times higher among black than among white families. The 1970 census showed that 8.6% of white families had incomes below the poverty level compared with 29.8% of black families, 20.4% of families of Spanish heritage (U.S. Bureau of the Census, 1970 Census, Vol. I, *Characteristics of the Population*, United States Summary 1-400), and 33.3% of American Indian families (U.S. Bureau of the Census, *Subject Report, American Indians* Table 9 (June 1973)).

Minorities also have received less education than white persons. Among persons 25 years old and older, 54.5% of whites had completed four years of high school or more by the time of the 1970 census. Only 31.4% of black persons, 36.0% of persons of Spanish heritage, and 33.3% of American Indians had completed high school. In the same age group, 11.3% of all white persons had completed four years of col-

lege or more, while only 4.4% of black persons, 6.0% of persons of Spanish heritage, and 3.8% of American Indians had finished college. Median school years completed among whites were 12.1, among blacks and American Indians 9.8, and among persons of Spanish heritage 9.6. U.S. Bureau of the Census, 1970 Census, Vol. 1, *Characteristics of the Population*, United States Summary, 1-386; and *Subject Report, American Indians*, Table 3.

In 1974, the unemployment rate among nonwhites was twice what it was among the white population: 9.9% compared to 5.0%. U.S. Bureau of the Census, *Current Population Reports, The Social and Economic Status of the Black Population in the United States 1974* 64 (1975). In 1976, among men of Spanish origin, the unemployment rate was 10.7%; among women of Spanish origin, the rate was 12.5%. U.S. Bureau of the Census, *Current Population Reports, Persons of Spanish Origin in the United States* 10 (March 1976).

The percent of minority group members holding low-paying and low-status jobs is substantially higher than the comparable percentage among whites. In 1970, only 10.2% of black persons, 13.6% of persons of Spanish heritage, and 14.0% of American Indians held professional, managerial, and administrative positions, compared to 23.9% of all white persons. Similarly, 12.0% of black persons, 11.8% of persons of Spanish heritage, and 12.7% of American Indians held jobs as laborers, while only 5.3% of white persons held similar employment. The disparity is even greater among service and private household workers

—28.1% of black persons, 15.1% of persons of Spanish heritage, and 19.2% of American Indians served in such capacities, but only 11.1% of white persons held that kind of job (1970 Census, Vol. 1, *Characteristics of the Population, supra*, at 1-746 to 1-748); *Subject Report, American Indians*, Table 7).

The figures for Asian-Americans (Japanese, Chinese, and Filipino only) are somewhat different. The number of families with incomes below the poverty level was 8.8% (U.S. Bureau of the Census, *Subject Reports—Japanese, Chinese, and Filipinos in the United States* 42, 101, 160). Among Asian-American persons 25 years old and older, 62.2% had completed four years of high school and 20.4% had completed four or more years of college. The median number of school years completed by Japanese-Americans was 12.5. Among Chinese-Americans, the comparable figure was 12.4, and among Filipino-Americans, 12.2 (*id.* at 9, 68, and 127). 2.0% of Asian-Americans were unemployed (*id.* at 13, 72, 142). 29.1% of Asian-Americans held professional, managerial, and administrative positions, while 7.2% were laborers and 16.9% were service and private household workers (*id.* at 31, 90, 149).

The final piece of supplementary statistical information is derived from a survey of minority construction contractors, published by the Department of Housing and Urban Development. The study reported that most minority business enterprises—indeed, approximately 75%—have had to rely on personal savings as the source of their original capital

investment. *A Survey of Minority Construction Contractors*, Office of the Assistant Secretary for Equal Opportunity, HUD, at 14-15. In the words of the survey, "individuals and institutions with equity money to invest have not been induced to invest in minority contractor enterprises" (*id.* at 15). Because of the relative poverty of the minority community (see page 3a, *supra*), it has been extremely difficult for minority firms to obtain initial capitalization. See *SBIC and SBLC Programs and Selected SBA Activities: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 2d Sess. 208 (1976). See generally *Interagency Report on the Federal Minority Business Development Programs*, Office of Management and Budget (1976); *Minority Business Opportunity Committee Handbook*, Office of Minority Business Enterprise, Department of Commerce (1976).

Additional Information Concerning Government Programs For the Aid of Minority Businesses

The Small Business Administration has been assigned the task of administering a number of programs aimed at alleviating some of the problems encountered by minority-owned businesses. Section 8(a) of the Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 389, 15 U.S.C. 637(a), empowers the SBA to administer a procurement program designed to increase the number of federal contracts performed by socially and economically disadvantaged

businesses, primarily minority-owned enterprises.[1] Congressional Research Service, *Minority Enterprise and Public Policy* 52 (1977) (hereinafter "CRS Report"). But according to a 1975 report published by the General Accounting Office,[2] the program's success in enabling disadvantaged firms "to become self-sufficient and competitive has been minimal."

The performance of the Section 8(a) program has been a subject of considerable congressional concern almost since the program's inception.[3] In 1978, Con-

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[1] The Small Business Administration's Section 8(a) program has been upheld in the face of numerous attacks on its validity. See, *e.g.*, *Valley Forge Flag Co.* v. *Kleppe*, 506 F.2d 243 (D.C. Cir. 1974); *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974); *Eastern Canvas Products, Inc.* v. *Brown*, 432 F. Supp. 658 (D. D.C. 1977); *Massey Services, Inc.* v. *Fletcher*, 348 F. Supp. 171 (N.D. Cal. 1972); *Fortec Constructors* v. *Kleppe*, 350 F. Supp. 171 (D. D.C. 1972). None of these cases addressed the constitutionality of the program.

[2] Comptroller General, *Report to the Congress on Questionable Effectiveness of the 8(a) Procurement Program* 7 (Apr. 16, 1975).

[3] See, *e.g.*, *Small Business and Labor Surplus Area Set-Asides and 8(a) Subcontracts: Hearing Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 91st Cong., 2d Sess. (1970); *SBA's 8(a) Subcontracting Program: Hearings Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. (1971); *Small Business Administration 8(a) Contract Procurement Program: Hearing Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. (1976), and related report, 95th Cong., 1st Sess. (1977); *Investigation into the Section 8(a) Program of*

gress amended the Small Business Act in order to strengthen the Section 8(a) program and clarify the eligibility criteria for recipients of government assistance. See Pub. L. No. 95-507, 92 Stat. 1757. Section 201 of the amendments (92 Stat. 1760) added to the statute a series of congressional findings recognizing the role of past discrimination in producing today's socially and economically disadvantaged persons (see note 40, *supra*). On the basis of these findings, Section 202 (92 Stat. 1761-1763) amended Section 8(a) of the Small Business Act to include express eligibility criteria defining "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged persons," in turn, are defined in the amended Act as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 92 Stat. 1762. In order to assist new small businesses, Section 202 authorized the SBA to waive the government's usual construction contract bonding requirements in certain situations. On May 29, 1979, the SBA issued regulations

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the Small Business Administration: Hearings Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs, 95th Cong., 1st & 2d Sess. (1979).

implementing portions of Pub. L. No. 95-507 and amending in part its Section 8(a) regulations. See 44 Fed. Reg. 30672. See also 44 Fed. Reg. 42832 (July 20, 1979).

As we have explained in the body of the brief (see page 66, *supra*), Section 211 of the 1978 statute (92 Stat. 1767-1770) amended Section 8(d) of the Small Business Act to require many federal contractors to make affirmative efforts to let subcontracts to businesses controlled by socially disadvantaged individuals. Section 211 also authorizes each federal agency, when entering into negotiated contracts, "to provide such incentives as such * * * agency may deem appropriate in order to encourage such subcontracting opportunities [for small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals] as may be commensurate with the efficient and economical performance of the contract." The Office of Management and Budget has issued rules implementing Section 211 (44 Fed. Reg. 23610-23613 (Apr. 20, 1979)), and the SBA has issued proposed regulations (44 Fed. Reg. 33884 (June 13, 1979)).

In addition to the Section 8(a) program, the SBA administers an investment program designed to encourage ownership of small businesses by "persons whose participation in the free enterprise system is hampered because of social or economic disadvantages * * *." Since 1972, the program has been explicitly authorized by Section 301(d) of the Small Business Investment Act of 1958, as amended, 15

U.S.C. 681(d). Between 1969 and 1972, the SBA, relying on its general authority under the Act, 15 U.S.C. 661 *et seq.*, conducted a modified version of the same program, limited to the encouragement of minority ownership of small businesses. When Congress expanded the scope of the program to aid all businesses owned by disadvantaged persons, the SBA retained the separate minority enterprise program (the "MESBIC" program) as part of the broader overall scheme. See CRS Report, *supra*, at 51.[4]

Because of the acute problems encountered by small businesses, including those owned by minorities, in obtaining surety bonds, Congress authorized the SBA to establish a Surety Bond Guarantee Program that would cover surety companies for up to 90 percent of their losses on bonds issued to small businesses.[5] In addition, the last five Congresses have considered numerous bills dealing with the difficulties encountered by minority-owned and other small businesses

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[4] The program's effectiveness has been criticized by the General Accounting Office. Report to the Congress by the Comptroller General of the United States, *A Look at How the Small Business Administration's Investment Company Program for Assisting Disadvantaged Businessmen is Working* i, ii (Oct. 8, 1975).

[5] Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1813, 15 U.S.C. 694a and 694b. (In 1970, the program covered contracts not exceeding $500,000. In 1974, the ceiling was doubled. In 1978, Congress again revised the Surety Bond program, establishing additional statutory guidelines for eligibility. See Section 111, Pub. L. No. 95-507, 92 Stat. 1758, to be codified at 15 U.S.C. 694b).

in obtaining bonding.[6] These bills include Pub. L. No. 95-89, 91 Stat. 553, enacted August 4, 1977, which increased the loan and surety bond guarantee authority under the legislation administered by the SBA, and Pub. L. No. 95-619, Title VI, Section 641, 92 Stat. 3284, enacted November 9, 1978, which established an Office of Minority Economic Impact within the Department of Energy and authorized the Secretary of Energy to provide loans to minority business enterprises to enable them to participate in contracting opportunities with the Department.

The Executive Branch has also sought to aid minority-owned businesses overcome "the barriers which now prevent many who are members of minority groups from controlling their fair share of American business." Statement of President Nixon, accompanying the issuance of Exec. Order No. 11,625, 7 Weekly Comp. of Pres. Doc. 1404 (Oct. 13, 1971);

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[6] In the 91st Congress, the bills included S. 2609, 2611, H.R. 15470, 17717, 17991, 17992, 17993, and 19819; in the 93d Congress, H.R. 7829; in the 94th Congress, S. 3370; and in the 95th Congress, H.R. 692, 2377, and S. 1442. These bills have been introduced in recognition of the fact that "[t]he Federal government has a duty to not only remove the barriers that restrict minority business development, but also provide a little added help—a few additional opportunities—to encourage minority business expansion." 124 Cong. Rec. S4168 (daily ed. Mar. 20, 1978) (remarks of Sen. Dole). Many other bills were also introduced during the same period to aid economically and socially disadvantaged small businesses: S. 1415 and 1941 (93d Congress); S. 2617, 3427, H.R. 12741, 12826, 13591, 13784, 13785, 14483, 14624, and 14924 (94th Congress); and S. 607, 927, 1228, 1264, H.R. 567, 4362, 4363, 4961, 6153, 7115, and 8912 (95th Congress).

36 Fed. Reg. 19967 (1971). In 1969, Exec. Order No. 11,458, 34 Fed. Reg. 4937 (1969), established the Office of Minority Business Enterprise (OMBE) within the Department of Commerce. OMBE was charged with the tasks of developing programs and coordinating interagency activities to encourage the growth of minority business enterprises. The OMBE program was strengthened and expanded by Exec. Order No. 11,625. More recently, however, a Comptroller General Report to the Congress concluded that "OMBE's assistance program does not appear to appreciably affect OMBE's program objective of closing the gap between the minority population/business ownership ratio." [7]

Under federal procurement regulations, all federal agencies must follow a minority procurement program to ensure that adequate efforts are made to extend contracting opportunities to minority business enterprises. 41 C.F.R. 1-1.1302. At the time the MBE provision was enacted, federal contractors were required to agree to use "best efforts" to provide minority businesses "the maximum practicable opportunity to participate in the performance of Government contracts." 41 C.F.R. 1-1.1310-2 (1976).[8] The

[7] Report to the Congress by the Comptroller General of the United States, *The Office of Minority Business Enterprise Could Do More to Start and Maintain Minority Businesses*, 7 (Nov. 10, 1977).

[8] This provision has recently been rescinded. See 44 Fed. Reg. 38478 (July 2, 1979). Congress has expanded the scope of the regulation: it now is directed toward increasing participation by all socially and economically disadvantaged businesses, including minority-owned businesses, in the federal procurement process. See the regulations issued by the Office of Federal Procurement Policy and implemented by the General Services Administration, 44 Fed. Reg. 23610 (Apr. 20, 1979); *id.* at 35068 (June 18, 1979); *id.* at 38478 (July 2, 1979).

effectiveness of the program was attacked in testimony before the House Subcommittee on SBA Oversight and Minority Enterprise:

> We find that in title 41, where you talk about the utilization of minority businesses in procuring contracts either in prime contractors or through the 8(a) program, [a contractor] has to use his best efforts. Well, that is a lot of baloney. Best efforts usually amount to looking at a directory of minority businesses that is usually out of date and they tried one or two or three and if they are unsuccessful then they say, we have made a best effort and they go on and get a majority guy to do the work.

Effects of New York City's Financial Crisis on Small Business: Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business, 94th Cong., 1st Sess. 34 (1975) (testimony of George Pattison, President of the Brooklyn Local Economic Development Organization).

The federal government has also attempted to prevent discrimination against and to increase the participation of minorities in state and local contracts funded by federal grants. The Department of Justice has issued a regulation to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, that pro-

hibits recipients of federal financial assistance from the Department from discriminating against minorities by denying them the opportunity to provide contracting services for federally funded programs. See 28 C.F.R. 42.104(b)(vi).[9] In addition, the Office of Management and Budget has established uniform requirements for federal agencies in the administration of grants to state and local governments. These regulations were initially issued in 1971, and at the time the MBE provision was enacted, they provided (42 Fed. Reg. 45890) that recipients of federal funds should make

> [p]ositive efforts * * * to utilize small business and minority owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for contracts to be performed utilizing Federal grants funds.

The United States Civil Rights Commission indicated, however, that these efforts did not have a significant impact on the participation of minority businesses in federally funded state and local contracts. See the Commission's Report, *Minorities and Women as Government Contractors* 89-93 (1975).[10] OMB has recently revised its regulation to provide (44 Fed. Reg. 47874 (Aug. 15, 1979)):

> It is the national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services.

The remainder of the revised provision lists certain affirmative efforts that recipients of federal funds are required to implement.

[9] Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14303 (1967), and Exec. Order No. 12,086, 43 Fed. Reg. 46501 (1978), prohibits discriminatory hiring practices in federal and federally-assisted projects. In some instances, the Secretary of Labor may require federal contractors to take affirmative action to identify minority businesses for subcontracts.

Statements by Members of Congress on Minority Business Problems and the Effects of Discrimination

The following remarks by several Members of Congress corroborate our submission that in enacting the MBE provision, Congress was seeking to remedy the effects of discrimination against minorities. Although the statements reproduced below were not made at the time the minority set-aside provision was introduced and considered on the House floor, their frequent repetition by different legislators over a substantial period of time demonstrates that the subject of discrimination against minority businesses

[10] For a list of some of the more than 100 federal agency programs providing financial, marketing, and management assistance to minority and other small businesses, see *Office of Minority Business Enterprise Federal Assistance Programs for Minority Business Enterprises* (U.S. Department of Commerce 1977).

was one with which Congress was both familiar and highly concerned. The collection of statements that follows is by no means exhaustive.

1. In recent hearings on bills to strengthen federal support for minority business enterprises, Representative Addabbo, Chairman of the House Subcommittee on Minority Enterprise and General Oversight, stated that "there is good reason why minority enterprise has not kept pace with the growth of the national minority population, and that reason—plain and simple—is discrimination." *H.R. 567, H.R. 4960, and H.R. 2379: Hearings Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business*, 95th Cong., 1st Sess. 3 (1977).

2. At the same hearings, Representative Mitchell observed (*Hearings*, at 42):

> As you well know, there are some minority companies which sort of folded overnight. They were doing business for the entire community and then suddenly the word got out that this is a minority-owned firm; it is owned by a black guy, and purchasing just stopped, which means that that man's business had to be confined only to the minority community itself.

3. Almost 10 years ago, in debate on the Senate floor, Senator Bayh explained some of the problems confronting minority businesses generally and minority construction contractors in particular. He stated that, although the construction industry has long served as a vehicle for upward economic mobility, it

"unfortunately has not generally welcomed the participation of non-white workers and contractors." 116 Cong. Rec. 18886 (1970). Quoting from a letter written by a Department of Commerce official working in the Office of Minority Business Enterprise, Senator Bayh said (*id.* at 18888-18889):

> [T]he minority contractor is severely hampered by the general lack of management and technical expertise. Because of the years of discrimination, minority contractors have not been able to develop those skills required in the industry to be a successful entrepreneur. Therefore some vehicle must be perfected which will provide these individuals with the assistance needed * * *.[11]

A further excerpt from the same letter described the difficulties encountered by minority construction firms in attempting to obtain necessary bonding (*id.* at 18888):

> The inability of minority contractors to obtain bid, performance and payment bonds is one of the most crucial of his problems. Surety companies require the minority contractor to have a capital liquidity of 30-100%, whereas his white counterpart is only required to produce 10-20%. The annals of history are filled with the cases of inequities on the part of surety companies who have historically refused to bond minorities in

[11] The problems arising from minority contractors' lack of adequate management and operational skills are also described in the Civil Rights Commission Report, *Minorities and Women as Government Contractors* 23 (1975). The problems include overbidding, lack of familiarity with government contracting regulations, and inadequate knowledge of future bidding opportunities.

> the construction industry on a parity with whites.[12]

Senator Bayh made the same point a year earlier, quoting from a report by the National Business League (115 Cong. Rec. 19383 (1969)):

> Only one-third of all Negro contractors were successful in securing performance bonds at any time and all of these had experienced "undue difficulty" in securing them. Seventy percent reported they had lost contracts because of inability to secure bonding.

4. In a prepared statement submitted to a Senate committee hearing in 1976, Senator Kennedy observed:

> Black construction contractors struggle [just] to bid on new projects going up right in the heart of the black community. When the firm is lucky enough to land a bid, unions, banks and bonding companies all seem to join together to guarantee that a minority owned firm will not land the job.

Small Business Administration 8(a) Contract Procurement Program: Hearing Before the Senate Select

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[12] See also 123 Cong. Rec. S4987 (daily ed. Mar. 28, 1977) (remarks of Sen. Bentsen); Report to the Congress by the Comptroller General of the United States, *Ways to Increase the Number, Type and Timeliness of 8(a) Procurement Contracts* 8, 24-26 (1978). See generally *H.R. 2377, H.R. 2379, and Small Business Administration Activities: Hearings Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business*, 95th Cong., 1st Sess. 80-81, 91, 93-103, 144-158 (1977); *Selected SBA Programs and Activities: Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 1st Sess. 9-10, 14-15, 19-21, 40 (1975).

Comm. on Small Business, 94th Cong., 2d Sess. 5 (1976).[13]

5. Commenting on the obstacles facing minority contractors who must obtain commercial financing for their projects, Representative Corman stated:

> We must accept the fact that a man's color has been a barrier to his access to credit in this country during all of our history and, therefore, if you have to take different steps for them [minorities] from other kinds of people, you are merely living in a real world. * * * I think that we have to accept the fact there are fewer black entrepreneurs in this country than there should be because of our historic problems of racism in this country.

Government Minority Small Business Programs: Hearing Before the Subcomm. on Minority Business Enterprise of the House Select Comm. on Small Business (Vol. 1) 2 (1971).

6. In a similar vein, Representative Hamilton has observed that "[m]any lending institutions are simply reluctant—often for the wrong reasons—to extend a line of credit to a minority businessman. Others have restricted lending policies that demand a credit

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[13] Minority contractors themselves appear to share Senator Kennedy's perception of the barriers to entry that they must surmount in the construction industry. See Civil Rights Commission Report, *supra*, note 21, at 21-22; *General Review of Major SBA Programs and Activities: Hearings Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business*, 95th Cong., 2d Sess. 5, 15, 56 (1978).

rating before credit can be made available." 124 Cong. Rec. E985 (daily ed. Mar. 2, 1978).

7. Senator Tower has also acknowledged the need for special financing assistance to minority businesses. In debate on the Small Business Investment Act Amendments of 1972, Senator Tower explained (118 Cong. Rec. 35378 (1972)):

> Our goal is * * * to give the capital push needed to get business formations and successes going in minority communities, so that they can have the chance to become self-sufficient and to develop the capital within the minority communities to develop their own financing resources in the future.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al.,

Petitioners,

against

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT STATE OF NEW YORK

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IN THE

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Petitioners,

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JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT STATE OF NEW YORK

Questions Presented

1. Does Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), which provides that at least 10% of federal grants for local public works projects shall be set aside for minority business enterprises, violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d?

Statement

The Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-121, 42 U.S.C. §§ 6701-6736 ("PWEA"), was enacted by Congress to extend the provisions of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999-1012, 42 U.S.C. §§ 6701-35 ("LPWA"). Under the LPWA, Congress appropriated $2 billion for direct grants to state and local governments to fund public works projects that would generate employment nationwide in the economically depressed construction industry. Section 109 of the PWEA, 42 U.S.C. § 6708, authorized the expenditure of $4 billion, and Congress subsequently appropriated $2 billion, for such projects. The PWEA also provided that work on the funded projects was to be performed by private firms, rather than by the state or local government grantees. Pursuant to these statutes, respondent State of New York received grants of approximately $42,119,000 (36a).*

Petitioners in this action include several associations of construction contractors and subcontractors and an air conditioning contractor who seek to prevent the Secretary of Commerce, as program administrator under the statute, and the State and City of New York, as grantees, from enforcing and implementing Section 103(f)(2) of the PWEA ("the MBE requirement") which requires that "10 per centum of the amount of each grant be expended for minority business enterprises." Petitioners argue that Section 103(f)(2) violates the Due Process Clause of the Fifth

* Unless otherwise indicated, parenthetical references are to the Appendix.

Amendment, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

In a decision dated December 19, 1977, District Judge Werker denied petitioners' request for a preliminary injunction and declaratory relief and dismissed the complaint. The opinion of the District Court (443 F. Supp. 253 [S.D.N.Y. 1977]) concluded that the MBE requirement satisfied the strict scrutiny analysis that must be applied to legislative classifications based on race, and, therefore, did not deprive petitioners of due process or equal protection under the Fifth and Fourteenth Amendments to the Constitution. The District Court further held that the MBE requirement did not violate Title VI of the Civil Rights Act of 1964, pointing out that "it defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive" (202a-203a).

The Court of Appeals unanimously affirmed, 584 F. 2d 600 (2d Cir. 1978). Noting that "a large measure of judicial restraint must be accorded to Congress in its enactment of legislation to remedy past discrimination" (214a), the Court of Appeals held that the MBE requirement was constitutional (211a).

Statute Involved

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), provides:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For pur-

poses of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

Summary of Argument

The MBE provision was enacted by Congress in the exercise of its powers to enforce the Civil War Amendments to the Constitution. Judicial review of such action by Congress properly entails greater deference than that accorded comparable state, administrative or private activity.

The 10% set-aside for minority business enterprises was designed to remedy the effects of past discrimination. Congress had a clear basis upon which to determine the compelling need for this legislation, in view of the well-established history of discrimination in the construction industry and government surveys which reveal the insignificant participation of minority businesses in the economy.

Moreover, the MBE requirement is necessary to alleviate discriminatory conditions that still exist because alternative methods of relieving them have failed. The challenged legislation is directed at minority groups that are the most prominent victims of discrimination in our society. Thus, the MBE requirement is consistent not only with the Constitution, but with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, as well. The statutes share the goal of ending discrimination and its effects, and Congress has clearly indicated that the use of race-sensitive measures in order to achieve this aim is both permissible and desirable.

ARGUMENT

I

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), Does Not Violate the Constitution.

A. The MBE Provision Is A Proper Exercise Of Congressional Authority

The federal Constitution grants Congress special powers to establish the terms and conditions for federal expenditures, *e.g., Lau* v. *Nichols,* 414 U.S. 563, 569 (1974), and to enforce the terms and intent of the Civil War Amendments, *e.g., Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Katzenbach* v. *Morgan,* 384 U.S. 641, 650-651 (1966); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 327 (1966). Specifically, in relation to remedying the effects of past discrimination, the enabling clauses of the Civil War Amendments authorize Congress "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of . . . [those Amendments]." *Katzenbach* v. *Morgan, supra,* 384 U.S. at 651.

The MBE provision of the PWEA is a legitimate exercise of Congressional authority to fashion remedies for past discrimination pursuant to Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment. As this Court emphasized in *Lau* v. *Nichols, supra,* 414 U.S. at 569, not only does Congress have the "power to fix the terms on which its money allotments to the State shall be disbursed", but it also has the affirmative power to ensure that "public funds . . . not be spent in any fashion which encourages, *entrenches,* subsidizes or results in racial discrimination." (Emphasis added.) *Cf. Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964).

The constitutional powers of Congress are distinct from and, where national interests are at stake, greater than whatever authority the states, an administrative agency or private parties* may have to fashion affirmative efforts to eliminate the effects of racial or ethnic discrimination. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). Petitioners phrase their arguments as though addressing the authority of these other entities. When Congress exercises its powers pursuant to the Thirteenth and Fourteenth Amendments, it is particularly appropriate for this Court to defer to Congress' special role under these Amendments and to display marked restraint in its review of the challenged legislation. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 302 n. 41 (1978) (Powell, J.); *Katzenbach* v. *Morgan, supra*, 384 U.S. at 653.

B. The Challenged Statute Serves The Compelling State Interest Of Overcoming The Effects Of Discrimination Upon Minority Business Enterprises And Uses Narrowly Drawn Means To Accomplish That Purpose

Contrary to petitioners' argument, the Court of Appeals correctly subjected the MBE requirement to the strict scrutiny necessitated by a statutory classification of this kind. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Petitioners' claim that the Second Circuit instead incorrectly "fashioned a new 'fundamental fairness' test" contradicts the record itself (211a-212a) and distorts the analysis of the Circuit Court, which concluded that "even under the most exacting standard of review the MBE provision passes constitutional muster [footnote omitted]" (211a).

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* See *United Steelworkers of America* v. *Weber*, —— U.S. ——, 47 U.S.L.W. 4851 (U.S. June 27, 1979).

1. The MBE Requirement Serves A Compelling State Interest

In *Katzenbach* v. *Morgan, supra*, 384 U.S. at 653, in discussing the basis for Congress' enactment of § 4(e) of the Voting Rights Act of 1965 and the resulting prohibition of New York City's English literacy requirement for voters, this Court stated:

> "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did . . . Any contrary conclusion would require us to be blind to the realities familiar to the legislators [footnote omitted]."

This language is especially pertinent to the instant case, where petitioners contend that the record does not support the conclusion of the Court of Appeals that Congress perceived a compelling interest requiring the enactment of the challenged statute. The courts may not substitute their judgment for that of Congress in assessing and weighing the factors involved in the enactment of legislation.

Petitioners attribute particular significance to the admittedly "sparse" legislative history of the MBE requirement and vehemently attack the Court of Appeals for having noted that Congress' "lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry" (217a n. 10).

However, this Court, too, has recently commented that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America* v. *Weber, supra*, 47 U.S.L.W. at 4852 n. 1. Indeed, petitioners operate in areas which the federal

courts, including those sitting in New York, have repeatedly characterized as following a clear-cut, historical pattern of racial discrimination. See, *e.g., United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46,* 471 F. 2d 408, 413-14 (2d Cir.), *cert. den.* 412 U.S. 939 (1973); *Associated General Contractors of Massachusetts* v. *Altschuler,* 490 F. 2d 9, 18 (1st Cir. 1973), *cert. den.* 416 U.S. 957 (1974); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F. 2d 159, 173 (3rd Cir.), *cert. den.* 404 U.S. 854 (1971). See generally *Rios* v. *Enterprise Association Steamfitters, Local No. 638,* 501 F. 2d 622 (2d Cir. 1974); *Equal Employment Opportunity Commission* v. *Steamfitters Local No. 638, Sheetmetal Workers, Local No. 28,* 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd. as mod.* 532 F. 2d 821 (2d Cir. 1976).

The Court of Appeals and the District Court in this case are not alone in recognizing that Congress does not enact legislation in a vacuum. In *Rhode Island Chapter, Associated General Contractors of America, Inc.* v. *Kreps,* 450 F. Supp. 338 (D.R.I. 1978), another District Court, in commenting on the legislative history of the MBE requirement, stated:

> ". . . the lack of detailed debate may reflect a sufficient consensus to pass the minority business requirement without major legislative battle. More specifically, Congress has sufficiently familiarized itself over the past decade with the nature of discrimination that it need not repeat lengthy legislative findings of fact." 450 F. Supp. at 348 n. 4.

This Court has recognized Congress' "special competence . . . to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures" pursuant to its powers under § 2 of the Thirteenth Amendment. *Regents of the University of California* v. *Bakke, supra,*

438 U.S. at 302 n. 41. In this case, the Congressional findings with respect to the MBE requirement are implicit in the legislation itself. Moreover, even in the absence of extensive legislative history containing designated "findings", Congress is presumed to have acted with full knowledge of the area addressed by the statute, particularly where, as here, its purpose is unambiguous. See *Katzenbach* v. *Morgan, supra,* 384 U.S. at 655-56; *East New York Savings Bank* v. *Hahn,* 293 N.Y. 622, 628 (1944), *aff'd.* 326 U.S. 230 (1945). See also *Cannon* v. *University of Chicago,* —— U.S. ——, 60 L. Ed. 2d 560, 574 (1979).

Like the veterans' preference laws considered by this Court in *Personnel Administrator of Massachusetts* v. *Feeney,* —— U.S. ——, 60 L. Ed. 2d 870 (1979), affirmative action measures like the MBE requirement "have been challenged so often that the rationale in their support has been essentially standardized." 60 L. Ed. 2d at 879 n. 12. Thus, not only is Congress' purpose in enacting the MBE requirement as self-evident as the classification itself,* but the basis for Congress' action is equally apparent from the historical context for the factors reviewed by the Court of Appeals.

The lack of participation by minority business enterprises "in our total business system generally, or in the construction industry, in particular" has been attributed by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise to "a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, 182-83 (November, 1976); 218a-219a. As a result,

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* "The amendment [adding the MBE requirement] makes no sense unless it is construed as a set-aside to benefit minority subcontractors", declared the Court of Appeals with appropriate succinctness (214a).

as noted by the Court in *Constructors Association of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936, 951 (W.D. Pa. 1977), *aff'd.* 573 F. 2d 811 (3rd Cir. 1978):

> "Despite a minority population of about 17%, minority individuals control only about 4% of the businesses in the United States, and minority businesses account for less than 1% of national gross business receipts and total business assets. (Interagency Report on the Federal Business Development Programs, March 1974, at 24; Minority Business Opportunity Committee Handbook, August, 1976, at I-1). And it has been estimated that minority businesses obtain less than 1% of government contracts. (Minorities and Women as Government Contractors, U.S. Commission on Civil Rights Report, May 1975, at 2, 86 and 89)."

These statistics, which were considered by both courts below (193a-194a, 221a-222a), may also be gleaned from the U.S. Bureau of the Census, 1972 Census of Construction Industries: Industries Series, United States Summary—Statistics for Construction Establishments With and Without Payrolls, Table A1 (Aug. 1975) and the U.S. Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses, Table 1 (May 1975).* Against this background, the remarks by Representative Mitchell, sponsor of the amendment which added the MBE requirement to the PWEA (123 Cong. Rec. H. 1437-41 [daily ed. Feb. 24, 1977]), cannot be dismissed as mere "debate rhetoric", notwithstanding the contrary view of the Court in *Associated General Contractors of California* v. *Secretary of Commerce*, 441 F. Supp. 955, 969 (C.D. Cal. 1977), *vacated and remanded* 438 U.S. 909, *on remand* 459 F. Supp. 766 (C.D. Cal. 1978), *appeal docketed sub nom. Armistead* v. *Associated General Contractors of California*, 47 U.S.L.W. 3563 (U.S. Jan. 15, 1979) (No. 78-1107). His remarks and those of Representative Conyers, noted by the Court of Appeals below (216a), accurately point out the real obstacles faced by minority business enterprises in this country, and, in fact, they are confirmed by the statistics cited above.

> "From this perspective, it seems illogical and unsound to distinguish between those aspects of the social history of racism that can be traced to identified discrimination on the part of governmental and private entities, and those that cannot. What Justice Powell [in *Bakke*] called 'societal discrimination' is nothing more than an accumulation of wrongs on the part of governmental and private entities that cannot be identified with particularity at the present time. But their consequences are no less enduring because they cannot be so identified. The non-identifiable nature of the discrimination does not obviate the government's valid and substantial interest in redressing its consequences. It merely converts that interest from

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* Petitioners claim that these figures are "unreliable and inconclusive" because the number of minority contractors and the amount of dollar receipts of minority-owned construction businesses increased 34.28% and 84.45%, respectively, between 1969 and 1972. The obvious flaw in petitioners' argument, however, is that the base from which these allegedly "dramatic" increases were generated is so small that the subsequent participation of minority business enterprises in the economy, as indicated above, is still virtually without significance. Petitioners' additional objection to consideration of surveys of minority participation in the construction industry prior to the effective date of Titles VI and

(footnote continued on following page)

(footnote continued from preceding page)

VII of the Civil Rights Act of 1964 in order to establish the historical framework within which to evaluate the need for the MBE requirement is similarly ill-founded. This case does not involve the imposition of remedies for discrimination pursuant to these statutes, and, therefore, it need not be limited to facts occurring after their effective date.

a constitutionally mandated to a constitutionally permissible one." Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism,* 14 Harv. Civ. Rights—Civ. Lib. L. Rev. 133, 157 (1979).

The courts below, therefore, had a sufficient basis to discern Congress' remedial purpose in enacting the MBE requirement (*Constructors Association of Western Pennsylvania* v. *Kreps, supra,* 441 F. Supp. at 952) and to conclude that a compelling interest did, indeed, exist.

2. The MBE Requirement Constitutes Effective Yet Narrowly Drawn Means

In *Dunn* v. *Blumstein, supra,* 405 U.S. at 343, this Court said:

> "Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *United States* v. *Robel,* 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra,* at 631. And *if* there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means'. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960)." (Emphasis added)

The MBE requirement was enacted because Congress was aware that no "other, reasonable ways" existed to remedy the effects of discrimination against minority business enterprises and "because existing programs which had utilized alternative approaches had not succeeded in raising minority business participation in government contracts above 1%." *Constructors Association of Western Pennsylvania* v. *Kreps, supra,* 441 F. Supp. at 952. "The legislative history, if it indicates anything, shows that other, less-restrictive alternatives have not worked."

Ohio Contractors Association v. *Economic Development Administration,* 452 F. Supp. 1013, 1022-23 (S.D. Ohio 1977), *aff'd.* 580 F. 2d 213 (6th Cir. 1978).

This situation was described at the trial conducted by the District Court in the instant case. James F. McNamara, Assistant Commissioner of the New York State Division of Human Rights, testified that the problems of minority contractors have been "manifold":

> "Very often although they may have the capacity to perform certain work, they are unable to overcome all of these hurdles. It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if they don't have an established track record. They can not establish a track record if they don't get a chance to perform. So that type of program that I have observed and have been involved with particularly with the City, have [*sic*] largely been ineffectual." (112a-113a)

Petitioners argue that the 10% MBE set-aside ignores other socially and economically disadvantaged groups attempting to do business in the areas covered by the PWEA. However, "[t]he minorities listed in the MBE definition [Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts] are among those historically discriminated against in our society and were among those considered as minorities for purposes of the government reports on minority businesses." *Constructors Association of Western Pennsylvania* v. *Kreps, supra,* 441 F. Supp. at 952. Petitioners cannot seriously claim that the government is compelled either to remedy every aspect of a social and economic problem or to do nothing at all. *Cf. Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955).

The MBE requirement's effect upon petitioners' reasonable expectations is minimal, as noted by the Court of

Appeals (221a). To the extent that petitioners' expectations are greater than they would be in the absence of the history of discrimination against minority contractors, they surely "may be modified by statutes furthering a strong public policy interest." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 778 (1976).

As previously noted, the class of non-minority contractors to which petitioners belong already comprises 96% of the business enterprises and accounts for 99% of the gross business receipts in the area subject to the MBE requirement. Petitioners' argument that they are also entitled to participate in a governmental program to counteract the effects of discrimination against minority businesses is totally without merit.*

In *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), in discussing New York's use of racial criteria in redistricting under the Voting Rights Act of 1965, this Court commented that while "New York deliberately increased the non-white majorities in certain districts in order to enhance the opportunity for election of non-white representatives from those districts", "even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." 430 U.S. at 165-66. The MBE requirement, similarly race-sensitive, is an appropriate means to remedy one of "our society's most intransigent and deeply rooted inequalities." *Associated General Contractors of Massachusetts* v. *Altschuler, supra*, 490 F. 2d at 16.

Furthermore, the program implemented by the MBE requirement is of limited duration. Like the hiring program approved by this Court in *United Steelworkers of America* v. *Weber, supra:*

* Given the provision for waiver of the MBE requirement under certain conditions (136a-144a), its temporary, "one-shot" character and the small number of existing minority contractors able to take advantage of the MBE requirement, its diminution of non-minority participation in the relevant market may well be even less than that anticipated by the statute.

> "It thus operates as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance. See *University of California Regents* v. *Bakke*, 438 U.S. 265, 342 n. 17 (1978) (Brennan, White, Marshall, and Blackmun, JJ.). Because the duration of the program is finite, it perhaps will end even before the 'stage of maturity when action along this line is no longer necessary.' *Id.* at 403 (Blackmun, J.)." 47 U.S.L.W. at 4857 (Blackmun, J., concurring).

Petitioners' claims under the Fifth and Fourteenth Amendments represent an attempt to preserve an "equality" that is all too frequently encountered in American society. Petitioners construe "equality" to mean nothing more than maintenance of the very *status quo* that insures their own current privileged position. Their conception of equal protection transforms it from a "principle based on a perception of social needs" into another means of perpetuating discrimination. Karst and Horowitz, *Affirmative Action and Equal Protection*, 60 Vir. L. Rev. 955, 957-61 (1974).

In essence, the question posed in this case is, "when should what appears to be formal inequality be regarded as true equality"? Kaplan, *Equal Justice In an Unequal World: Equality For the Negro—The Problem Of Special Treatment*, 61 N.W.U.L. Rev. 363 (1966). The MBE requirement can be deemed unconstitutional only if viewed through the blinders of legal and historical abstraction, which have been thoroughly discredited in our time. In the words of Mr. Justice Marshall, concurring in *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 387:

> ". . . it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this

Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effect of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."

II

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), Does Not Violate Title VI of the Civil Rights Act of 1964.

In *Regents of the University of California* v. *Bakke, supra,* this Court reviewed the voluminous legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and concluded that Congress enacted Title VI to insure that the executive branch of the federal government had the power to condition the allocation of federal funds upon recipients' compliance with constitutional requirements:

> "Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support . . . Congress' solution was to end the Government's complicity [in this] . . . by providing [for termination of] financial support of any activity which employed racial criteria in a manner condemned by the Constitution." *Regents of the University of California* v. *Bakke,* 438 U.S. at 335-336 (Brennan, J., concurring and dissenting, joined by White, Marshall and Blackmun, JJ.).

This Court found in *Bakke* that Title VI was not enacted as a strict "colorblind" scheme. The majority in *Bakke*

held that Title VI only prohibited those race-conscious plans which violated the Constitution.

> "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287 (Powell, J.).

Just as the MBE provision is a legitimate exercise of Congressional authority and is clearly within constitutional bounds, it is also consistent with the intent and purpose of Title VI. Both statutes have the common goal of eradicating unlawful discrimination and its effects. In *Bakke,* Justice Brennan stated that, in light of the legislative history and the language of Title VI itself, "[Congress] clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution. . . ." *Id.* at 337. The MBE provision, as an affirmative allocation of federal funds, was specifically intended to serve as a remedy for the effects of discrimination. It is fully consistent with the similar purpose of Title VI.*

Furthermore, the opinion by Justice Brennan in *Bakke, id.* at 348-350, specifically describes the MBE provision as an act of Congress which:

> "eliminates any possible doubt about Congress' views . . . [and] confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination. . . ." *Id.* at 348.

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* In this regard it should be noted that the regulations applicable to recipients of financial assistance from the federal government pursuant to Title VI not only mandate affirmative action to overcome the effects of prior discrimination but also permit similar action to be taken by recipients without a history of prior discrimination. 45 CFR Part 80, § 80.3(b)(6)(i),(ii). *Cf. United Steelworkers of America* v. *Weber, supra; Lau* v. *Nichols, supra.*

Therefore, not only does the Brennan opinion view these two acts of Congress as consistent with each other, it also emphasizes that the subsequent enactment of the MBE provision, as well as the other legislation cited in footnote 25, 438 U.S. at 350, clearly demonstrates "that Congress believes race-conscious remedial measures to be both permissible and desirable. . . ."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Decision of the Second Circuit Court of Appeals be affirmed.

Dated: New York, New York
September 5, 1979

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 78-1007

H. EARL FULLILOVE, et al.,

Petitioners,

-against-

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE CITY OF NEW YORK, THE NEW YORK CITY BOARD OF HIGHER EDUCATION, and THE NEW YORK CITY HEALTH and HOSPITALS CORP.

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IN THE
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BRIEF FOR RESPONDENTS THE CITY OF NEW YORK, THE NEW YORK CITY BOARD OF HIGHER EDUCATION and THE NEW YORK CITY HEALTH AND HOSPITALS CORP.

STATEMENT

This case involves the exercise of Congressional power pursuant to the

Spending and Commerce powers and the Thirteenth and Fourteenth Amendments of the Constitution to eradicate and remedy the effects of past discrimination and to assure future equal opportunity. More particularly, it involves a short term, carefully limited Congressional attempt at achieving equal opportunity in the construction industry, an industry long resistant to integration efforts.

In 1977, Congress enacted the Public Works Employment Act ["PWEA"] (Pub. L. 95-28, 91 Stat. 116), which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 70 Stat. 997. In the PWEA, Congress included a provision, section 103 (f)(2), 42 U.S.C. §6705(f)(2), requiring that 10% of any grants under the program be awarded to qualified minority business

enterprises ["MBE set aside"]. Localities in which there were insufficient minority business enterprises to fulfill the requirements of this provision were permitted to apply for a waiver, and still participate fully in the grant process.

The petitioners claim that the MBE set aside is unconstitutional as violative of the equal protection guarantee secured under the Fifth Amendment. We address that contention in this brief.*

*Petitioners also argue that this Congressional action should be struck down because of a claimed violation of an earlier enacted statute, Title VI of the Civil Rights Act of 1964. 42 U.S.C. §2000d (1976). Because we believe this argument is frivolous, and in any event will be fully answered in the Solicitor General's brief, we do not burden this Court with our response to it.

SUMMARY OF ARGUMENT

We argue, first, that, notwithstanding the MBE provision in the PWEA according a preference to minority contractors, because this legislation involves an area of special competence and discretionary authority of Congress, it is not subject to the same level of strict scrutiny that would be required were this action taken by some other body or officer. Since this legislation reasonably serves an overriding national interest in remedying identifiable past and continuing discrimination, it should, without more, be upheld as constitutional.

We next argue that, even assuming this legislation must satisfy a strict scrutiny test, it is not violative of the guarantee of equal protection of the laws secured under the Fifth Amendment. The MBE provision in the PWEA is addressed to a problem of compelling national interest, to wit, pervasive and persistent discrimination in the construction industry, and is sufficiently limited, as to both the scope of the MBE program and its duration, to meet any objection that it unnecessarily burdens others. With respect to the petitioners' argument that this legislation was not accompanied by sufficient findings of discrimination, we point out that Congress is not required to make the sort of finding

that a court or other body or officer would have to make before ordering a remedy of this type and that, in any event, Congress has, over the past decade and a half, been investigating and debating the problem of racial discrimination in this country. Thus, Congress was fully competent to determine that discrimination existed in the construction industry which required remedying. As to petitioners' argument that the MBE set aside is not the least restrictive remedy available to achieve Congress' purpose, we point out that Congress has broader powers than the courts in fashioning remedies for discrimination, and, further, that, in fact, the alternative remedies suggested by petitioners are not realistic.

ARGUMENT

SECTION 103(f)(2) OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER

The most compelling criticism directed at the MBE set aside is that it accords an economic preference based on race. Indeed, quotas and set asides on a purely ethnic basis are foreign to the expressed policy of the City of New York. We have consistently refused to set aside tax levy monies specifically based on race, religion, national origin or sex, or to impose quotas in structuring the City work force. Apart from the fact that the same would conflict with the City's expressed policy, it is our opinion that the City does not have the legal authority to take such action, nor would there be any basis for requiring the City

to do so based upon the City's record in this area. The foregoing notwithstanding, we nonetheless urge that Congress has properly determined that a set aside is the effective remedy for an entrenched system of discrimination in the construction industry. We submit that this Court has no alternative but to uphold that determination. We base our position not only upon what we believe to be the essential justice of the remedy Congress has chosen for this particular discrimination, but also upon traditional approaches to determining the constitutional validity of Congressional enactments.

(1)

Petitioners argue that this Court must apply the same standard of review to this act of Congress that was applied to the actions of a state

university in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (Pet. Br. 8-10), that is, a standard of "strict scrutiny."

This argument ignores the crucial fact that here it is Congress which has acted. This Court has long recognized the "special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." Bakke, supra, 438 U.S. at 302, n. 41. See also Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

In Hampton, supra, the Court stated that, where the subject of the challenged Congressional legislation was one of "overriding national interest," a discriminatory rule, invalid

if adopted by a state, would be held to be valid when adopted by Congress, if there was a "legitimate basis for presuming that the rule was actually intended to serve that interest." 426 U.S. at 103. In reviewing such a rule, the Court would infer that "any interest which might rationally be served by the rule did in fact give rise to its adoption." Id.

That is precisely the case with the PWEA, and its MBE set aside. The PWEA deals with issues of overriding national concern: to wit, the depressed state of the national economy, and, with respect to the MBE set aside, the national interest in giving force and effect to the Thirteenth and Fourteenth Amendments. The PWEA was initially

conceived to address the "most serious economic recession since the Great Depression," H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1 ["H.R. Rep."]* and the MBE set aside was, clearly, designed to address obvious problems of racial discrimination and minority underrepresentation in a significant sector of our national economy.

Where Congress has legislated to end racial discrimination, this Court has acknowledged the very broad power of Congress. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Court upheld Congressional power under the Commerce Clause** to prohibit racial dis-

*Reprinted in [1977] U.S. Code Cong. & Ad. News 150, 150.

**U.S. Const., art. I, § 8, cl. 3.

crimination in public accommodations by private parties. Id. at 261. In Katzenbach v. Morgan, 384 U.S. 641 (1966), Congressional power under section 5 of the Fourteenth Amendment* was determined to be coextensive with its power under the Necessary and Proper Clause.** Id. at 650. In United Jewish Organizations, Inc., v. Carey, 430 U.S. 144 (1977) ["UJO v. Carey"], this Court upheld New York State's power to use racial criteria to provide greater nonwhite representation, because the state measure was effected to comply with the Voting Rights Act and to assure equal access to the franchise. Id. at 261.

*U.S. Const., Amend. XIV, § 5.

**U.S. Const., art. I, §8, cl. 18.

A legislative enactment such as the PWEA, specifically intended to remedy the depressed state of the economy, is a traditional exercise of Congress' Commerce Power. The MBE set aside, as one of many preferences included in the PWEA, is valid both under the Commerce Clause, because of Congress' determination that MBE's were being excluded from federal contracts, and under section 5 of the Fourteenth Amendment, because the PWEA provides a remedy for historically established racial discrimination.

Where a challenged statute involves a decision by the federal government to "spend money to improve the general public welfare," Mathews v. deCastro, 429 U.S. 181, 185 (1976), the de Castro and

other decisions of this Court* establish that the wisdom of such a determination is "not confided to the courts," Helvering v. Davis, 301 U.S. 619, 640 (1937), because Congress is the "institution charged under our scheme of government with the primary responsibility for making such judgments." Califano v. Goldfarb, 430 U.S. 199, 210 (1977). Only if the challenged classification fails to "rationally further some legitimate governmental interest," United States Department of Agriculture v. Moreno, 413 U.S. 528, 532 (1973), is invalidation appropriate.

*See, e.g., Califano v. Torres, 435 U.S. 1 (1978); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. Diaz, 426 U.S. 67 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); Dandridge v. Williams, 397 U.S. 471 (1970). The Spending Clause, U.S. Const., art. I, § 8, cl. 1, is the source of Congressional power where appropriations to promote the general welfare are in issue.

In addition to the principal purpose of the 1976 PWEA to stimulate the economy, the 1977 act had additional purposes: to "do a better job of," inter alia, "[i]nsuring a more equitable distribution of projects," "[s]implifying administration" and "[r]eflecting local priorities." H.R. Rep., supra, at 3. To meet these additional objectives, a number of preferential provisions were included in the 1977 PWEA, of which the MBE set aside was but one.* Petitioners'

*Priority was given to projects designed to conserve energy, local government projects and local school district projects (section 106, 42 U.S.C. § 6707(b)(2), (3) and (4)); and projects involving health care and rehabilitation facilities (section 108, 42 U.S.C. § 6707(j)). Also, provisions were included requiring hiring preferences for Vietnam veterans and disabled veterans (section 104(f), 42 U.S.C. § 6706); requiring that projects provide for accessibility by the handicapped (section 103(g), 42

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brief discusses the MBE set aside without any reference to these other provisions of the PWEA, which furnish clear evidence that Congress intended thereby to advance a variety of national priorities.

Because the PWEA, including the MBE set aside, is an exercise of plenary Congressional power under the Commerce and Spending Clauses and section 5 of the Fourteenth Amendment, it is a valid legislative enactment if it meets the standards articulated by this Court

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Continued from previous page

U.S.C. § 6705(g)); protecting job opportunities for citizens and legal residents by explicitly prohibiting employment of illegal aliens (section 103(e)(2), 42 U.S.C. § 6705(e)(2)); providing for stimulation of other industries by expressly requiring that only American products be used in construction (section 106(f)(1)(A), 42 U.S.C. § 6705(f)(1)(A)); providing for a 2 1/2 per cent set aside for projects in Alaska Native Villages and Indian Tribes (section 105, 42 U.S.C. § 6707(a)).

in reviewing previous acts of Congress under these powers. Because of Congress' special competence in this area, if the interests are legitimate, and the means are plainly adapted to further those interests, the legislation is valid. Heart of Atlanta Motel, supra, 379 U.S. at 261-62; de Castro, supra, 429 U.S. at 185; Katzenbach v. Morgan, supra, 384 U.S. at 650. This standard is met by the legislative objectives of the PWEA and the means chosen to achieve them.

(2)

Even assuming here the applicability of a strict scrutiny test, the MBE set aside is constitutional. The provision serves a compelling interest and is sufficiently narrow to further Congress' objectives without unnecessarily burdening others.

In enacting the MBE set aside, Congress intended to remedy past racial discrimination in the construction industry, a compelling governmental interest. Petitioners do not contest Congress' authority to legislate remedies for past discrimination. They find fault only with what they consider to be a paucity of legislative history precisely tied to the enactment of the MBE provision (Pet. Br. 11-12), and then conclude that Congress has failed to meet the Bakke test (Pet. Br. 12-13). In Bakke, however, the Court did not purport to limit Congressional power to act in the area of racial discrimination; that issue was not before it. Rather, it rejected the competence of the Davis Medical School to make such

findings because, "in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination," 438 U.S. at 309 (emphasis added). Congress most certainly has such "authority and capability"; such is the clear import of section 5 of the Fourteenth Amendment.*

*To state that Congress has such authority, or power, is by no means to suggest that this power should be exercised in a particular way. Congress' determination as to whether to adopt a particular measure is peculiarly political; it must take into account political and pragmatic considerations. In this, Congress' role is very unlike that of the courts, which, at least generally, are charged merely with responsibility for construing and applying received law.

There is no legal authority for petitioners' narrow position that, to survive constitutional scrutiny, a Congressional remedy for discrimination must be accompanied by detailed legislative findings. Congress does not have to investigate de novo each time it acts in an area which it has already scrutinized at length. In the case at bar, the Court of Appeals set forth an extensive list of legislation enacted by Congress "during the past decade and a half for the benefit of those minorities who have been victims of past discrimination." 584 F.2d at 605 & n.7. See also Rhode Island Chapter v. Kreps, 450 F. Supp. 338, 352-56 (D.R.I. 1978); Ohio Contractors Association v. Economic Development Administration, 452 F. Supp. 1013, 1022 & n.7 (S.D. Ohio 1977), aff'd,

580 F.2d 213 (6th Cir. 1978); Constructors Association of Western Pennsylvania v. Kreps, 441 F. Supp. 936, 951-52 & n.8 (W.D. Pa. 1977), aff'd, 573 F.2d 811 (3rd Cir. 1978). Moreover, federal courts, in upholding the affirmative action plans required of federal construction contractors under Executive Order 11246, have found that the federal government's intent under 11246 was to remedy past racial discrimination in the construction industry. Two such decisions, Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), and Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 951 (1971), are cited with approval in Bakke, supra, 438 U.S. at 301-02. To

condemn the MBE set aside because Congress did not begin anew to consider whether minorities had been discriminated against in the construction industry would place an overwhelmingly restrictive limitation upon Congress' ability to act under its conceded constitutional powers.

Petitioners' further argument that there has been no finding that white contractors have discriminated against MBE's (Pet. Br. 13), and therefore a remedy imposing a burden on white contractors fails to meet the Bakke test (Pet. Br. at 15), must be rejected. Although Congress has itself recognized that account should be taken of the legitimate expectations of parties, and burdens should not be unfairly imposed on innocent parties, see, e.g., section 703(h) of Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e-2(h), nevertheless, effective remedies in many instances will necessarily have an impact on specific persons who were not in any sense guilty of discrimination. Thus, in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 774 (1976), the Court recognized that affirmative relief there ordered against an employer "diminishe[d] the expectations of other, arguably innocent, employees." Such expectations, it noted, may be modified by statutes where there is "a strong public policy interest in so doing." Id. at 778.

Petitioners cannot take issue with the fact that racial discrimination in employment in the construction industry has been rampant and relatively impervious to legislative and judicial remedies. In the New York City con-

struction industry alone, there have been a plethora of such findings, dating back to 1964 and continuing to the present.* These cases have found discrimination by unions and contractors by exclusion of racial minorities from training and

*See, e.g., EEOC v. Sheet Metal Workers Local 28, 401 F. Supp. 467 (S.D.N.Y. 1975), aff'd as modified, 532 F.2d 821 (2d Cir. 1976), rev. order aff'd, 565 F.2d 31 (2d Cir. 1977); EEOC v. Operating Engineers Locals 14 and 15, 415 F. Supp. 1155 (S.D.N.Y. 1976), aff'd in part, rev'd in part, 553 F.2d 251 (2d Cir. 1977); Rios v. Enterprise Ass'n Steamfitters Local 638, 360 F. Supp. 979 (S.D.N.Y. 1973), aff'd as mod., 501 F.2d 622 (2d Cir. 1974); United States v. Wood Wire and Metal Lathers Local No. 46, 341 F. Supp. 694 (S.D.N.Y. 1972), aff'd, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); EEOC v. Operating Engineers Locals 14 and 15, 438 F. Supp. 876 (S.D.N.Y. 1977); State Comm'n of Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 Sup. Ct. N.Y. Cty. 1964).

employment in the construction industry.* See also United Steelworkers of America v. Weber, ___U.S. ___,

*By executive order and regulations the City of New York, within the limits of its competence and authority in this area, has taken positive steps to remedy the problem of minority underemployment in the construction industry. This has taken the form of the City's requiring its construction contractors to attempt to meet minority employment goals. The industry, including both the contractors and the unions, has continually resisted this City initiative. See, Broidrick v. Lindsay, 39 N.Y.2d 64, 350 N.E.2d 595 (1976); Fullilove v. Beame, Sup. Ct., New York County, May 11, 1977, Index No. 1673/77 (invalidating regulations promulgated subsequent to Broidrick v. Lindsay), aff'd 64 A.D.2d 961, 409 N.Y.S.2d 121 (1st Dep't 1978), app. pending. See, also, Fullilove v. Carey, 62 A.D.2d 798, 406 N.Y.S.2d 888 (3d Dep't 1978), app. pending.

99 S.Ct. 2721, 2725 n.1 (1979).*

It is a patently logical inference that the inability of racial minorities to be employed in the construction industry has resulted in their failing to gain the capital and experience

*In State Comm'n of Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. Cty. 1964), the court found in 1964 that of 3300 members and 430 apprentices in the Sheet Metal Workers Local 28, there was not one Negro member and there never had been, id. at 960, 252 N.Y.S.2d at 652, and ordered broad affirmative relief, id. at 966-69, 252 N.Y.S.2d at 657-60. Thirteen years later, in EEOC v. Sheet Metal Workers Local 28, 565 F.2d 31 (2d Cir. 1977), the Court of Appeals found that between 1959 and 1975 Local 28 had admitted only 24 additional journeymen to its union, all white, even though 15% of the applicants had been nonwhite, id. at 33, and again broad affirmative relief was ordered, id. at 34-36.

to successfully become contractors.* Indeed, petitioners concede as much. In their discussion of "less drastic means," petitioners point out that "[o]ne of the greatest sources of training for persons entering into the business market for the first time is to learn from the experience of those already there or who have been there" (Pet. Br. 27), and that one of the reasons minority contractors fail is that they do not have the capital to meet the

*See Rhode Island Chapter, supra, 450 F. Supp. at 356:

> Barriers to work on construction projects, in turn, may well decrease the number of minorities sufficiently experienced to begin their own construction firms. Congress could reasonably infer that the lack of minority business enterprises was caused in part by the past discrimination in related unions documented in case after case.

high cost of security bonds (Pet. Br. 28-29). Had racial minorities not been excluded solely on the basis of race from the opportunity to obtain such experience on the job, it could be expected that minorities would not be as underrepresented among the ranks of contractors as they are today. Congress has not acted indiscriminately by attempting to ameliorate this harsh effect of employment discrimination by providing the remedy of a MBE set aside. Moreover, to directly attack the continued problem of discrimination in employment in the construction industry, Congress does not act without justification when it concludes that MBE's would not exclude racial minorities from employment on the basis of race from federally

financed construction projects, as white contractors historically have. Compare Rhode Island Chapter, supra, 450 F. Supp. at 358.*

In light of the documented history of race discrimination in the construction industry, and because Congress acts with a "special competence" in identifying past discrimination, Bakke, supra, 438 U.S. at 302 n.41, there can be no question but that Congress' action in enacting the MBE set aside was justified by a compelling government interest.

(3)

Assuming still that this Congressional enactment is subject to

*Conversely, we do not understand the MBE set aside to sanction reverse discrimination by minority employers. MBE employers are as much bound by antidiscrimination statutes as are other employers.

the strict scrutiny test, the second prong of that test requires examination of the means used by the legislature to accomplish its objective. Shelton v. Tucker, 364 U.S. 479, 488 (1960); Loving v. Virginia, 388 U.S. 1, 11 (1966). In the case at bar, the petitioners urge, in effect, that for this legislation to survive scrutiny Congress would have have had to make findings similar to what a court or administrative agency would be required to make in order to justify ordering similar relief. But that is not the law. Congress has the power to act on a broader scale than that afforded a court:

> Congress necessarily acts on a level of generality, both in its fact-finding and the scope of its remedies, far beyond that appropriate to a court

> limited to the case or controversy at bar. Thus, it would be inappropriate, in fact impossible, to require Congress to make judicial-like findings of discrimination before it could enact remedies that employ racial quotas.

Rhode Island Chapter, supra, 450 F. Supp. at 354. Accord, Ohio Contractors Association, supra, 452 F. Supp. at 1022. In Katzenbach v. Morgan, supra, 384 U.S. at 656, this Court affirmed Congress' prerogative to weigh alternative remedies. "[I]t is enough that we perceive a basis upon which Congress might predicate a judgment." In UJO v. Carey, supra, 430 U.S. at 156, this Court again affirmed Congress' prerogative to choose remedies for racial discrimination more efficient and stringent than case-by-case determinations could provide. By choosing the MBE

set aside, Congress exercised its prerogative in an area where it has a "specially informed legislative competence." Katzenbach v. Morgan, supra, 384 U.S. at 656. See also Bakke, supra, 438 U.S. at 302 n.41.

Petitioners' argument that Congress should have chosen a method less restrictive than a set aside when attempting to remedy past discrimination in the construction industry (Pet. Br. 24-31) is disingenuous. They ignore that part of the strict scrutiny analysis that permits a more restrictive means if necessary to accomplish the legitimate objectives of the legislation. If the end is legitimate, a "less drastic" means is necessary only "when the end can be more narrowly achieved." Shelton v. Tucker, supra, 364 U.S. at 488. Petitioners' alternatives

are, of course, less drastic than that selected by Congress, but such less drastic "means" are a chimera. Less drastic means of attempting to eradicate and remedy discrimination in the construction industry have been attempted repeatedly and continuously over the past decade and a half. They have all failed.* Indeed, such is the record of this industry that it is impossible to believe that petitioners' suggestions

*See Brief for Defendant-Appellee Juanita Kreps, United States Court of Appeals for the Second Circuit, Appendix A, listing several pages of federal programs providing financial assistance, marketing assistance, business management assistance and other types of assistance geared to aiding minority businesses. See also Constructors Association of Western Pennsylvania v. Kreps, supra, 441 F. Supp. at 951 n.8. The failure of "less drastic" remedies to produce the desired result is self-evident in the finding by Congress that MBE's participate in only 1% of federally funded construction projects.

continued on next page.

of less drastic means are seriously proffered.

Certainly, the Reconstruction Era Congress which debated the Fourteenth Amendment could not have foreseen that racial discrimination would be as long lived in our society as it has proved to be. Since the enactment of the Civil Rights Act of 1964, Congress has again focused its attention on this pervasive, intractable problem. It is not insensitive to all that petitioners here urge, but it is also not blind to the need to take

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Senator Brooke and Representative Mitchell, in introducing the MBE set aside in the Senate and House, respectively, each noted that fact. See 123 Cong. Rec. S.3910 (daily ed. March 10, 1977); 123 Cong. Rec. H.1465 (daily ed. Feb. 24, 1977).

meaningful measures to eradicate and remedy persistent discrimination.

In enacting the PWEA of 1977 Congress did not act rashly or radically. Rather, in a limited context and for a very short period, it directed that affirmative steps should be taken to remedy past discrimination. Although we believe that the imposition of a racial quota is a drastic remedy, even a remedy of last resort, in this instance it was fully justified. This Congressional action, long overdue in this industry, should be held entirely lawful.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

October 8, 1979

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FOR ARGUMENT

In The

Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

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Petitioners,

-against-

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Respondents.

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

The absence of formal congressional findings of past discrimination in the construction industry renders the MBE set-aside unconstitutional.

As the Government acknowledges, in passing the MBE requirement, Congress failed to make detailed findings of past discrimination in the construction industry sufficient to sustain the racial classification in question (Gov. Br. 26-31). The Government, however, would have us believe that the lack of any legislative findings or record incident to Congress' passage of the MBE Amendment is equivalent to the lack of any need for such findings in this case (Gov. Br. at 30). Such reasoning not only defeats the underlying purpose of the Equal Protection Clause, but serves to confound the issue of racial preferences with that of the extension of government benefits in general. Absent detailed and articulated legislative findings of prior discriminatory acts to justify the racially-based set-aside, the statute lacks a compelling state interest and is therefore unconstitutional (Pet. Br. at 15).

The Government attempts to defeat the policy behind the Equal Protection Clause which extends the fundamental constitutional guarantees to all people. Although Article I, Section 1 of the Constitution does not mandate that Congress make specific findings prior to the enactment of a statute, it is submitted that some factual basis disclosed by the record is in fact necessary to support a legislative enactment which provides a *preferential* racial classification resulting in a fixed racial quota. The cases which the Government cites to substantiate its proposition that Congress need not, if they so chose, record any element of factual support for such an enactment (Gov. Br. 28) are wholly inappropriate and thus inapplicable to the case at bar.

Reliance upon *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (*see* Gov. Br. 28) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (*see* Gov. Br. 52, 61, 68), both of which upheld minimum eligibility standards for voting in federal and state elections, is inappropriate. The Government's use of these two cases to support its rationale for the dearth of legislative findings in regard to the MBE requirement is improper. Although the Court in *Oregon v. Mitchell, supra*, 400 U.S. at 284, stated that "[i]n the interests of uniformity, Congress may paint with a much broader brush than may this Court," (Gov. Br. 28), the Court went on to note that in both that case and in *Katzenbach v. Morgan, supra*, the Legislature made explicit findings on the respective records. *See* 400 U.S. at 132-133; *Katzenbach v. Morgan, supra*, 384 U.S. at 653. Furthermore, in both *Oregon* and *Katzenbach*, the statutes under consideration never attempted to revoke basic constitutional protections by granting *preferential* treatment to some while restricting the rights of others. Rather, the statutes which were the subject of those cases, *extended* the right to vote to a *greater number of people* than had previously been accorded that right by the respective state laws. Even if there had not been specific congressional findings in those cases, constitutional rights would not have been abridged because the voting acts expanded rather than narrowed, the availability of the elective franchise for *all*.

The MBE enactment, however, in enforcing a set-aside requirement on the bidding of all public works projects, imposes a cognizable injury in that it forecloses the opportunity for non-minority contractors to compete for at least 10% of the appropriated monies. To uphold the validity of the 10% MBE requirement, which accords a racial preference solely on the basis of race, would be the first time that this Court has sustained such a provision absent any record upon which to base such decision. Although the Government cites *Regents of the University of California v. Bakke*, 438 U.S. 265, 362-369 (1978) (Gov. Br. 22, 61) and *Steelworkers v. Weber*, ____ U.S. ____, 61 L. Ed. 2d 480 (1979) (Gov. Br. 59, 61) in an attempt to

sustain the continued utilization of race-conscious affirmative measures, it is petitioners' contention that these two cases, both of which involve voluntary affirmative action plans, are applicable only for a limited purpose.[1]

In *Regents of the University of California v. Bakke, supra,* Justice Powell indicated his approval of legislatively imposed quotas where "there has been *detailed legislative consideration* of the various indicia of previous constitutional or statutory violations" 438 U.S. at 302 n.41 (emphasis supplied).[2] Similarly,

1. In fact, the court in *Weber* specifically noted the narrowness of its inquiry. The court noted that the affirmative action plan at issue did not involve state action, and thus could not be challenged under equal protection principles. 61 L. Ed. 2d at 487. Moreover, the court found that minority exclusion from craft unions was so commonplace that judicial notice of same was proper. *See* 61 L. Ed. 2d at 486 and n.1. No such conclusion is warranted herein since the MBE requirement operates not to remedy employment discrimination, *i.e.*, historic exclusion of minorities from craft unions, but rather the underutilization of minority businesses. *See* Pet. Br. at 8 and n.2.

2. Justice Powell also stated in *Bakke:*

> ". . . there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 172-173, 51 L. Ed. 2d 229, 97 S. Ct. 996 (Brennan, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. *See DeFunis v. Odegaard,* 416 U.S. 312, 343, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making." 438 U.S. at 298.

Justice Brennan declared that the Court's opinions in *Bakke* stood for the "central meaning" that the "[g]overnment may take race into account when it acts *not to demean or insult any racial group,* but to remedy disadvantages cast on minorities by past racial prejudice, *at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area.*" *Id.* at 325 (emphasis added). Implicit in the Court's language is the need to articulate the wrongs to be remedied and to carefully fashion the appropriate remedies.

II.

Least Onerous Means.

The Government suggests to this Court that the burden is on petitioners to demonstrate that less onerous means exist, to accomplish minority business participation in the construction industry, as a prerequisite to any finding of the MBE provision's unconstitutionality (*see* Gov. Br. at 65). Quite obviously, the Government's tortured speculative analysis of what Congress could reasonably have concluded, underscores the fact that the record is devoid of any attempt by that body to follow the dictates of this Court when proffered legislation impinges upon constitutional guarantees (*see id.* at 54, 66-68). Such guarantees are not so easily suspended without a clear showing in the record by the lawmakers, that no other alternative is available.

In *Dunn v. Blumstein,* 405 U.S. 330 (1972), this Court noted that a "heavy burden of justification is on the State" which enacted a law restricting voting rights, and that such legislation "will be closely scrutinized in light of its asserted purposes." *Id.* at 343. *See also,* Pet. Br. at 21-22. Finding that the Tennessee Legislature had in fact no evidence before it which would indicate the necessity of the statute at issue, this Court summarily struck down such law in favor of protecting the constitutional right to travel. *Id.* at 346.

Similarly, in the case at bar, Congress had nothing in the record before it which would tend to indicate the ineffectiveness of the various existing anti-discrimination provisions in, for example, the Civil Rights Act of 1964 or, the federally funded SBA program. (*See* Gov. Br. at 54, Pet. Br. at 22.) The Government's characterization of Congress' alleged "special ability to gather and evaluate a wide range of factual information." (*see* Gov. Br. at 52), most certainly yields to a policy of close scrutiny of the legislative record when the Court undertakes a review of facially discriminatory legislation. Whatever special ability or special competence Congress may possess when it enacts racially neutral legislation, the very foundation of due process and equal protection under the law requires that race-conscious legislation, whether enacted by Congress or otherwise, be subject to such rigid standard of review. Legislative classification, based upon the color of one's skin, is no less repugnant to the cherished principles of due process and equal protection because it happens to be born of Congress.[3]

The MBE provision was no more than an afterthought to an appropriations bill, totally devoid of the prophylactic prerequisites mandated by this Court.

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3. Moreover, the context in which the Government attempts to demonstrate this Court's recognition of any special ability by Congress to legislate is wholly discernable from the case at bar. Thus in *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (*see* Gov. Br. at 24-25) rather than attempting to legislate exclusionary provisions affecting members of the public, the Court upheld congressional *extension* of the elective franchise (*see* p. 3, *supra*).

In like manner, the Government's reliance upon *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) for support of its statement that "[e]ven the most carefully tailored remedial measure may sometimes have an adverse impact on the legitimate interests of non-minorities" is misplaced. The Court therein specifically noted that the reapportionment plan at issue produced "no fencing out the white population from participation in the political processes of the county." *Id.* at 165. Such plan did not carry the racial slur or stigma (*id.*) attendant to the operation of the MBE Amendment's exclusion of non-minorities. The Government offers no plausible analysis in support of its bare statement that non-minorities do not suffer an exclusion from their occupation (*see* Gov. Br. at 60-61).

CONCLUSION

For the above stated reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

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FOR ARGUMENT

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IN THE

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On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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REPLY BRIEF FOR PETITIONER, GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., THE NEW YORK STATE BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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REPLY BRIEF FOR PETITIONER, GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., THE NEW YORK STATE BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

ARGUMENT

I. A Question Exists As To The Derivation Of Constitutional Authority For The MBE Set-Aside Provision [1]

The Secretary of Commerce and the City of New York, the New York City Board of Higher Education,

[1] Petitioner, General Building Contractors of New York State, Inc., the New York State Building Chapter, Associated General Contractors of America, Inc. (hereafter "GBC"), intends to address only specific concepts argued in opposing briefs. Matters not argued herein should not be construed as an agreement with any position raised in those opposing briefs or as a waiver of any defense. This Reply Brief is intended to be a supplement to GBC's initial Brief on the merits filed with this Court on August 6, 1979.

and the New York City Health and Hospitals Corporation (hereafter referred to as "SOC Brief" and "State of N.Y. Brief," respectively), argue that the 10 percent MBE set-aside provision, Section 103(f)(2), 42 U.S.C. § 6705(f)(2) (hereafter "MBE" or "set-aside" provision), enacted by Congress in the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-121 (hereafter PWEA), is a proper exercise of congressional authority under the Thirteenth and Fourteenth Amendments and/or Article I of the Constitution.[2] This conclusion is far from clear.

This Court established long ago that the Federal Government is one of "enumerated powers." Thus, the Congress can basically exercise only those powers granted to it under the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316, 405 (1819). However, this Court's determination whether a constitutional basis exists for the MBE set-aside provision, requires in the first instance a clear understanding of the purpose of that provision. The Government argues (see, *e.g.,* SOC Brief at 26; State of N.Y. Brief at 6,8) that the MBE provision was enacted as a remedy to eliminate the

[2] The Government (SOC Brief at 8-9 n.5) raises an issue of "case and controversy" as to whether Petitioners established that they have been "injured" by the set-aside provision. This issue was not raised by the Government in response to the Petition for *cert.* Notwithstanding this factor, the Government admits in footnote 5 that the record below does contain evidence of harm. This alone satisfies the "case and controversy" issue. *See Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Ass'n of Data Processing Serv. Organization* v. *Camp,* 397 U.S. 159 (1970). Additionally, the Government concedes the harmful impact the set-aside provision has on non-minority contractors (see State of N.Y. Brief at 22-23). An association of such contractors has standing to assert, as here, the rights of its members who are or may be injured. *See Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

effects of discrimination in the construction industry. The dearth of legislative history of the set-aside provision in no way establishes this proposition. In fact, GBC asserts that if any conclusion can be drawn, it is that Congress intended through the set-aside to increase the number of MBE's in federally-funded projects in hopes of achieving a balance or parity in the construction industry between minority and non-minority businesses.

Representative Biaggi stated in reference to the MBE provision (123 Cong. Rec. H1440, Feb. 24, 1977; also see SOC Brief at 47-48):

> "It is time that the thousands of minority businessmen enjoyed a sense of economic parity. *This amendment will go a long way toward helping to achieve this parity and more importantly, to promote a sense of economic equality in this Nation.*" (Emphasis added)

Representative Mitchell described the MBE provision in the following light (*id.* at H1436-H1437; also see SOC Brief at 46):

> "We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to *giving those minority businesses a piece of the action,* the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.' "

As argued in GBC's initial Brief, the MBE set-aside provision has not been established as based on findings of identified discrimination in the construction industry. Rather, as the above indicates, it would appear that the preference was enacted in an attempt to increase

MBE participation in federally-funded programs in order to achieve economic parity for minority-business-enterprises in construction. Even the Government would appear to agree with this conclusion by its statement (SOC Brief at 56) that the MBE provision is "positive legislative action to *guarantee* a place for minority contractors in funded project construction." (Emphasis added)

GBC asserts, therefore, that the question of constitutional authority for this provision must be analyzed with respect to this purpose of increasing MBE participation in federally-funded projects, of seeking *parity* for MBEs in the construction industry, and *not* as a congressional remedy for legislative findings of discrimination as asserted by the Government.

A. The MBE provision is not within the scope of the enabling clause to the Thirteenth Amendment

The Government asserts that the MBE provision is a proper exercise of congressional authority under the Thirteenth Amendment (see, *e.g.*, SOC Brief at 19).[3] GBC disagrees.

[3] The "Brief for the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae*," p.11 n.2, raises a question of mootness in these proceedings. Neither the District nor Appellate Courts below found the issue "moot." Further, neither Government Brief argued the case was "moot." In fact, they clearly concede that the case is not moot since money under the project still remains to be let in the project area which "may result in a requirement that the grantee expend other project funds for an acceptable minority contract." SOC Brief at 6-7 n.4. Moreover, the issue is *not* "moot" notwithstanding these facts. Several bills were introduced *after* the effective date of the PWEA in Congress in 1978 providing for further funding. The MBE provision was not deleted. *See AGC of California* v. *Secretary of Commerce*, 459 F. Supp. 776 (C.D. Calif., 1978), *appeal filed* Sup. Ct. No. 78-1108, November 6, 1978. In fact, the House passed the Economic Development and Public Works Act, H 2063, on November 14, 1979. That bill contains the MBE set-aside provision after Rep. Ashbrook's amendment to delete the provision was defeated. Furthermore, the Court is directed to President Carter's statement of October 17, 1979, where he pledged to triple the government purchases from MBEs. 86 CCH-*Employment Practices*, Issue No. 949 (Oct. 25, 1979). In light of the foregoing as well as the short-term duration of these grants, it is therefore obvious that the MBE provision is capable of repetition and yet may evade review. Under these circumstances, the issue should not be considered as "moot." *See Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976); *So. Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515 (1911). Finally, GBC respectfully indicates to the Court that numerous courts which have faced this issue have not found the case "moot." *See, e.g., Constructors Ass'n of W. Pa.* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Ass'n* v. *EDA*, 580 F.2d 213 (6th Cir. 1978); *Virginia Chapter, AGC* v. *Kreps*, 444 F. Supp. 1167 (W.D. Va., 1978); *Wright Farms Constr. Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977).

The Thirteenth Amendment, Sec. 1, provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 provides:

> Congress shall have power to enforce this article by appropriate legislation.

The historical importance of this Amendment, of course, was that it completed the abolition of slavery and involuntary servitude as well as prohibited the badges and incidents thereof. The Amendment is not a declaration in favor of a particular people, but reaches every race and individual. *Bailey* v. *Alabama*, 219 U.S. 219, 240-241 (1911); *Hodges* v. *United States*, 203 U.S. 1, 16-17 (1906). While the applicable scope of the Amendment has never been completely defined, this

Court has never indicated that it applies to anything but the *eradication of existing conditions* which prevent one race from exercising certain rights. The emphasis, however, is that Congress under the enabling clause has been permitted to *eliminate* existing racial barriers. *See Griffin* v. *Breckenridge,* 403 U.S. 88 (1971) (where the Court stated that Congress could determine what are the badges and incidents of slavery, and could pass legislation to *eliminate* it); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968) (where the Court found that passage of 42 U.S.C. § 1982 was within the authority of Congress under the enabling clause to the Thirteenth Amendment to *eliminate* the conditions that prevented blacks from buying and renting property because of their race).

The MBE set-aside provision, however, is not intended to "eliminate" an existing racial barrier, but to increase the number of Minority Business Enterprises participating in federally-funded programs and to build a *parity* in the construction industry between "minority" and non-minority contractors. This Court has never construed the Thirteenth Amendment as a basis for this type of Congressional enactment. Indeed, the very purpose of the MBE provision of excluding on the basis of race in order to achieve this objective runs afoul of the historical purpose of the Thirteenth Amendment.

B. The MBE provision is not within the scope of the enabling clause to the Fourteenth Amendment

The Fourteenth Amendment, Section 1, provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5, provides that:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

While the full extent of Congress' powers under Section 5 has never been determined, *Griffin* v. *Breckenridge, supra* at 107, this Court has stated that the enabling clause authorizes Congress "to enforce the *prohibitions* [of the Amendment] by appropriate legislation." *Katzenbach* v. *Morgan,* 384 U.S. 641, 648-649 (1966) (Emphasis added). The "prohibition" which the set-aside is supposed to enforce is, of course, the equal protection clause. GBC asserts that the passage of the MBE provision to obtain "economic parity" for MBEs in the construction industry by use of a racial classification, is *not* legislation to assure that persons are not denied rights or benefits given to others, but to create a classification to achieve a racial balance in the construction industry. Congress created in the MBE provision a racial barrier to increase MBE participation in federally-funded projects in order to satisfy its theory as to how society ought to be organized. Justice Douglas correctly stated in *DeFunis* v. *Odegaard,* 416 U.S. 312, 337-44 (1974):

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

Consequently, GBC does not believe the MBE provision falls within the permissible scope of Section 5

to the Fourteenth Amendment. In fact, it violates, not enforces, the equal protection prohibition.

C. The MBE provision is not a proper exercise of congressional authority under Article I of the Constitution

The Government also asserts that the Congress had authority to pass the MBE set-aside provision under the "necessary and proper" Clause of Article I, Section 8, Cl. 18 (see SOC Brief at 19, etc; State of N.Y. Brief at 11, etc.). This provides that Congress shall have powers:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ."

The Government indicates in its briefs (SOC Brief at 19; State of N.Y. Brief at 16) that the "foregoing powers" relevant here are (1) the spending powers clause, Article I, Section 8, Cl. 1,[4] and (2) the commerce clause, Article I, Section 8, Cl. 3.[5]

This Court has long held that under Cl. 1's "general welfare" language, Congress may spend money in a manner "necessary and proper" to effectuate that purpose. *See, e.g., Helvering* v. *Davis,* 301 U.S. 619 (1937); *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937). However, this Court has never determined whether the limit of this power is only to tax and spend, or whether it also permits Congress to legislate

[4] This provision provides: "The Congress shall have the power to lay and collect taxes . . . to . . . provide for the . . . general welfare of the United States. . . ."

[5] This provision provides that the Congress shall have the power: "To regulate commerce . . . among the several states. . . ."

generally under this provision.[6] This Court would have to expand the construction of the spending powers clause to include the authority for Congress to legislate generally if the set-aside provision is to be construed as derived therefrom.

With respect to the commerce clause, this Court has concluded that certain legislation concerning civil rights is authorized by this provision. This has occurred, however, where (1) there was a clear record of past discrimination affecting interstate commerce to which the legislation was addressed, and (2) the legislation was intended to eliminate that discrimination. *See, e.g., Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964). It is GBC's position that the MBE provision has no legislative record of past discrimination in the construction industry and is not intended to eliminate any discrimination. Rather, the purpose of the set-aside provision is to increase MBE participation in federally-funded projects in order to achieve a "parity" with non-minority contractors.

Even, however, if the Court concludes that constitutional authority exists under either the spending powers clause or the commerce clause for Congress to enact the MBE preference provision, no question exists that Congressional authorization under either provision is not unbridled. For example, in *King* v. *Smith,* 392 U.S. 309, 333 n.34 (1968), the Court stated:

> "the Federal Government, *unless barred by some controlling constitutional prohibition,* may impose the terms . . . and conditions upon which its money allotments shall be disbursed . . . ." (Emphasis added)

[6] See Corwin, *The Constitution and What it Means Today,* pp. 37-38 (1974).

Also see *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Lau* v. *Nichols,* 414 U.S. 563 (1974). If the Court finds constitutional authority for Congress to pass the set-aside preference legislation, the question becomes whether it is constitutionally prohibited elsewhere. We now turn to that issue.

II. Constitutional Restrictions On Racial Preferences

A. Equal protection—race may not be used as the sole determinative for receipt of governmental benefits in the absence of findings of discrimination

Justice Powell stated in *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 2757-58 (1978), that the Supreme Court has never:

> "approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."

In cases involving statutory classifications, such "findings" must be a result of a detailed legislative consideration of the various indicia of previous constitutional or statutory violations. *Bakke, supra* at 2755 n.41.[7] The reason for this is clear. No compelling interest is established to justify the use of race in the absence of such findings. Justice Powell stated, *Bakke, supra* at 2758:

> "Without such findings, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no *compelling justification* for inflicting such harm." (Emphasis added) [8]

[7] The Government (State of N.Y. Brief at 9-10) argues that less "detailed" legislative findings of discrimination are required when Congress passes a race-based classification than if the same provision were passed by a state legislature. The basis for this assertion is this Court's opinion in *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 103 (1976). It should be noted, however, that Justice Steven's language was dicta in this case, that two concurring Justices specifically reserved ruling on this issue, and that four other Justices dissented. Additionally, even if we were to assume that this view represented a majority of the Court, *some* findings of discrimination are necessary in the limited circumstances of race-based preference legislation in order to determine that Congress' purpose is not invidious. Since there are no findings by Congress under the PWEA of discrimination in the construction industry, the MBE provision does not even pass the *Hampton* test. Further, contrary to the Government's assertion (SOC Brief at 31, n.14), requiring findings of discrimination where Congress intends to pass a race-based preference provision would not hamper Congress' ability to perform its lawmaking function. As is the case with most provisions in bills before Congress, a racial preference provision need only be reviewed and considered in committee during development of the bill. This would not impose any undue hardship on Congress nor impede its law-making function.

[8] The Government (SOC Brief at 23-24) cites certain Supreme Court cases as sustaining race-conscious affirmative action. Aside from the question of whether all of these cases stand for that proposition, *see, e.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), specific findings of discrimination were found in each case cited. Any remedies imposed were thus to remedy that discrimination. Here, no specific findings of discrimination in the construction industry have been made. As previously stated, the set-aside was passed to increase the number of MBEs in the construction industry, to achieve "economic parity" for MBEs in the words of Representative Biaggi, *supra* at 3. Consequently, the cases are inapposite to the issue here. Also, the "Brief for the Lawyers Committee for Civil Rights Under Law as *Amicus Curiae,*" p. 9, asserts that there was evidence before Congress in passing the PWEA of "discrimination by government contracting officers . . . in the disbursement of federal funds." The citations referenced by Amicus do not establish that there was any discrimination in the disbursement of federal funds.

The Court noted below that in enacting the MBE set-aside provision Congress created an explicitly race-based condition on the receipt of PWEA funds. *Fullilove* v. *Kreps,* 584 F.2d 600, 602 (2d Cir. 1978).[9] Since, as more fully explained in GBC's initial Brief, there were no legislative findings of any indicia of discrimination in the construction industry, a "compelling" justification for Congress to benefit one class of citizens solely on the basis of race over all others has not been established.[10] This provision was intended to give

[9] The Government's assertions (SOC Brief at 60-63) that the set-aside provision may not work as a quota to exclude non-minority contractors is misleading. The Government first asserts it is not an exclusion because non-minority contractors are not excluded "from any particular 10 percent of the funded work." The point is not from which 10 percent they are excluded, but the fact that they are excluded 100 percent from the opportunity of participating in at least 10 percent of *any* portion of the project because of race. The Government also implies that the waiver procedure under the Act means the set-aside provision is not a quota. The applicability of the waiver procedure to this requirement applies only when MBEs are not available. *Bakke, supra* at 2778 (Brennan, White, Marshall & Blackmun, JJ., dissent). Furthermore, the Government's assertion that non-minority contractors have lost no right or expectation by § 103(f)(2) also misses the point. Equal protection demands that "public funds, to which all taxpayers of all races contribute, not be spent in any fashion which . . . results in racial discrimination." *Lau* v. *Nichols, supra* at 569.

[10] The Government attempts a *post hoc* justification of the lack of any findings of the indicia of discrimination under the PWEA by making numerous references to the legislative history of other Acts. (SOC Brief at 34-41, for example). Since many such references date back several years preceding the PWEA, there is no indication that the Congress which passed the PWEA was necessarily aware of the history of those other Acts, or even if they were, that they took into consideration reports made by subcommittees under such Acts. Additionally, the Government's citation to reports and statistical studies not part of any congressional record does not establish that any Congress was aware of such

MBEs "a piece of the action" (Rep. Mitchell), 123 Cong. Rec. H 1436 (Feb. 24, 1977), to achieve in the construction industry an "economic parity" between MBEs and non-minority contractors. (Rep. Biaggi), *id.* at H 1440. All races are constitutionally protected from congressional abuse of one group's rights in order to enhance the position of another group. The MBE provision is nothing more than Congress' desire to improve the position of one racial class at the expense of the opportunity to compete of another in order to achieve a societal parity. As one of the most liberal members to have ever sat on this Court stated:

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . . So far as race is concerned, *any* state-sponsored preference to one race over another . . . is . . . 'invidious' and violative of the Equal Protection Clause." (Emphasis added). *De-*

information. Moreover, the statistical references by the Government (See, *e.g.*, SOC Brief at 38-39) appear to be irrelevant here. First, the MBE provision concerns contractors, not employees in crafts (SOC Brief at 38 n.22). Furthermore, statistics concerning the number of MBE contractors in a particular industry, the number of contracts let in the area related to that type of business, the number of MBEs who actually bid, and the percentage of acceptance of such bids in comparison to the acceptance of bids of non-minority contractors, could have some meaning. The Government's statistics, however, do not address these areas. GBC would also like to note that it is not clear that the information contained in the Appendix to the Government's Brief (SOC Brief at 1a-20a) is part of the record in this case and properly before the Court under Rule 36 of the Supreme Court's Rules, 28 U.S.C. If this information is not part of the record and not subject to judicial notice, GBC believes it should not be considered here. *Cf, United States* v. *Snyder,* 428 F.2d 520, 523 (9th Cir. 1970), *cert. denied,* 400 U.S. 903; also see Stern & Gressman, *Supreme Court Practice,* p. 174 (1978).

Funis v. *Odegaard, supra* at 337-344. (Douglas, J. Dissent)

B. Least means--the MBE set-aside is not the least harmful method to increase the number of MBE contractors

Assuming, *arguendo,* that a "compelling" justification exists for the MBE provision, the Government seems to assume that the means chosen, the 10 percent set-aside, is automatically constitutional. There is neither evidence in the legislative history of the PWEA nor in the record in this case establishing that the set-aside would cause the least harm to non-minority contractors. In fact, as pointed out in GBC's initial Brief (see pp. 18-31), the means chosen would not even effectuate this result. The focal point must be on the purpose of the provision, the results of the means chosen, and whether other, less harmful alternatives would have achieved the purpose.

As stated, the purpose of the MBE set-aside provision is to increase the number of MBE contractors in federally-funded projects. The Government asserts the set-aside is necessary to achieve this purpose because 42 U.S.C. 1981, Titles VI and VII of the Civil Rights Act of 1964, and the Equal Credit Opportunity Act "had made little progress by 1977, toward increasing the participation of minority business enterprises in the national economy." (SOC Brief at 54).[11] These

[11] The United States Department of Justice warned a group of MBE contractors that a proposed agreement whereby MBE contractors would receive 10 percent of the subcontracting work in publicly-financed projects would "foreclose enterprises not owned by minorities from competing" and contemplates a competitive restraint to effect a societal goal. This letter raises a question whether such exclusion would be a violation of Federal Antitrust laws. See U.S. Department of Justice *Press Release,* September 21, 1977, 700 BNA-*Fed. Contract Rept.,* A-15 (1977).

statutes, however, did not have as their purpose to increase the participation of MBEs in the economy. Rather, they were intended to afford all persons equal opportunity to compete. The Government also asserts that "[w]ithout some positive legislative action to guarantee a place for minority contractors in funded project construction, minority firms would have been largely excluded from the local public works program." While this, of course, is purely speculative, GBC does wish to indicate to the Court that the SBA program discussed in GBC's initial Brief, serves to aid minority business even though it is not drawn in such onerous racial terms as the MBE set-aside provision. Reports of that program demonstrate that of approximately 1,500 businesses participating in the 8(a) program, 95 percent are minority even though the program does not exclude non-minority contractors from participating because of race. "Newsletter," *Black Enterprise* at 9 (Nov. 1977).

Moreover, even if one assumes, as does the Government, that the set-aside was necessary to increase MBE participation in the projects, there is nothing in the PWEA which would indicate that MBEs would be brought into the construction industry because of this legislation. As pointed out in GBC's initial Brief, page 19, the difficulties that minority contractors have faced have not concerned discrimination as such but problems such as inadequate working capital, difficulty in obtaining bonding, and problems with Federal paperwork. These are concerns of any contractor attempting to become viable. Because of the short-term duration and the structure of the MBE program, and because none of these problems are addressed by the set-aside provision, it would therefore appear unlikely that any

minority business enterprise would enter into the construction business because of this provision. The set-aside, in effect, provides only a temporary shield from competition, not a stimulus to increase the number of MBEs in construction.

With respect to less harmful alternatives than the MBE set-aside to achieve Congress' purpose of increasing the number of MBEs in the federally-funded projects, the Government indicates less onerous alternatives Congress could have chosen by referencing problem areas for companies trying to become viable in the construction industry. For example, lack of capital, exclusion from trades, lack of credit-worthiness, and insurability with lenders and insurers (SOC Brief at 34-37). However, these alternatives are not addressed by the set-aside, nor is there any indication they were considered by Congress. Some of the alternative means discussed by GBC in its initial Brief (pp. 21-31), *e.g.*, joint ventures, technical, financial and educational assistance, actually would train persons in some of these crucial areas, such as bonding.[12] Neither the Government nor supporting amici in any way analyze these alternatives except for Section 211 of the 1978 Amendment to the Small Business Act, Pub. L. No. 95-507 (SOC Brief at 66). As to all of the others, the Government's position appears to be that the alternatives are not any less harmful in a constitutional sense because they also use race as a criterion. This position misses the point.

[12] Other alternatives have been proposed to the Department of Commerce, including a proposal submitted by the Associated General Contractors of America, Inc., on February 14, 1979, entitled "Training Program for Socially/Economically Disadvantaged Construction Specialty Contractors." This proposal concerned the development of a technical services program in conjunction with the University of Colorado. The program proposal contained a full range of courses concerning areas crucial to any business attempting to become viable in the construction industry.

First, GBC is not advocating *any* particular approach. In fact, an approach using "disadvantage" would be preferable to using a racial designation.[13] Secondly, the means proposed all involve to one degree or another less harmful impact to excluded non-minorities since race is either not the sole factor or even a factor in some of these approaches.[14] The point of the matter, however, is that the legislative history of the

[13] In *Bakke,* Justice Powell believed that race could be used as a factor, but not the only factor for a governmental race-based classification where there were no findings of discrimination. Justices Burger, Rehnquist, Stewart and Stevens have not announced their views on this proposition. However, GBC respectfully directs the Court's attention to an unpublished article submitted to the Court in this case where argument is made that the equal protection standard in cases such as this should not permit the use of race as a criterion altogether, not simply that it could be used only if the "strict scrutiny" test is met. Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution." The following portion in regard to the proper equal protection standard is significant for this Court to consider in cases of congressional preferences based on race without any findings of discrimination: "Those for whom racial equality was demanded are [now] to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. If discrimination based on race is constitutionally permissible when those who hold the reins can come up with compelling reasons to justify it, then constitutional guarantees acquire an accordianlike quality. . . . [O]ur Constitution was designed to avoid these ends by avoiding these beginnings." *Id.* at 14.

[14] The Government asserts that a distinction based on "disadvantage" under the SBA program as opposed to minority or racial status is not any clearer in providing guidance. In support of this proposition (SOC Brief at 67-68 n.42), the Government notes that because of the state of the economy, "all construction contractors might have considered themselves economically disadvantaged in

PWEA does not establish that Congress ever considered less harmful means when in fact there were other ways to increase MBE participation in federally funded projects that either did not infringe or had a lesser impact on non-minority contractors' equal protection rights.[15] The MBE set-aside provision is not constitutionally permissible under these circumstances.[16]

1977." This not only does not support the Government's position, but works to further the question as to why the set-aside provision was enacted if all contractors were suffering equally.

[15] Even if a quota can be justified from asserted legislative concern about the effectiveness of the means to increase MBE contractors, a mini-scale test of its effectiveness to substantiate its necessity in light of its racially-based exclusions should have been tried first. See Haley, "How Socio-Economic Government Procurement Can Be Improved," 10 *National Contract Management J.* at 57-72 (1976).

[16] The "Brief Amicus Curiae of the Minority Contractors Ass'n, Inc," raises an issue that the proper standard for review under this Court's decisions, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 548 (1974), for Indians is the "rational basis" test irrespective of the standard to otherwise be applied. Aside from the question of whether Congress' special concern under the Constitution, (*e.g.*, Article I, Section 8, Cl. 3) towards Indians means that no higher level of scrutiny than the "rational basis" test should ever be used, the *Morton* case as well as the others cited by Amicus are distinguishable from the MBE provision. In *Morton*, the Court specifically found that the preference was not racial, but a congressional purpose to further the cause of Indian self-government. No such finding in this case has been made, nor does the legislative history of the PWEA support any such conclusion. The set-aside was passed to increase the number of MBEs in the federally-funded projects. This included American citizens who are Negroes, Spanish-speaking, Orientals, Eskimos, Aleuts, as well as "Indians." There is no indication the set-aside is to further the cause of Indian self-government. Consequently, a dual standard of review, one for Indians and one for all others, is not warranted here even assuming it may be in other situations. Furthermore, even though the set-aside was designed to increase "minority," including "Indian," participation, Congress failed to define a workable standard of the persons who would qualify for the preference. For example,

C. The MBE set-aside provision does not serve "important governmental objectives" and raises questions of stigma

Justice Brennan stated on behalf of Justices Marshall, White, and Blackmun, *Bakke, supra* at 2784-2785, that the test to be applied in cases such as this is that racial classifications:

> "Must serve important governmental objectives and must be substantially related to achievement of those objectives. . . . [T]o justify such a classification, an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of the benign program."

The Brennan group concluded in *Bakke, supra* at 2785, with respect to "important governmental objectives" that the record established an *articulated purpose* of remedying the effects of past societal discrimination. That is not the case here. The Government, as well as the Appellate Court below, only assume a purpose to remedy the effects of past discrimination.

"Indians" could mean *only* those of American origin or it could also include those of Asian origin. "Spanish-speaking" could be construed in a manner to include all persons of non-Latin antecedents who are fluent in Spanish. This lack of definition for classifying persons who are to receive the benefits on the basis of race under the set-aside provision means that the classification used to achieve the statute's objective is arbitrary and does not meet the standard required by due process. *See A. B. Small Co.* v. *Am. Sugar Refining Co.*, 267 U.S. 233, 240 (1925). Moreover, there is no understanding why certain racial and ethnic classes were included while others were not. Even if one assumes Negroes should be included because they may allegedly be suffering adverse effects of past societal discrimination, there is no evidence that other groups are of similar status. The Government itself pointed out in its Brief in *Bakke* that "orientals" as a race are not demonstrably suffering the adverse effects of discrimination. 183 BNA-*Daily Labor Rept.* D-12 n.39 (1977).

The Court below held, as quoted by the Government in its Brief, that "[i]n view of the comprehensive legislation which Congress has enacted during the past decade and a half . . . *any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine.*" (Emphasis added) The *only* articulated purpose which appears from the legislative history of the PWEA and this record is to increase the MBE participation in the construction industry—to achieve an "economic parity" for MBE's.

The Brennan group would also require:

> "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the [industry] . . . ."

Neither the legislative history of the PWEA nor the record in this case indicates *any* basis for concluding that MBE representation in the construction industry is "substantial and chronic." Further, there is no evidence that any past societal discrimination is "impeding access" of minorities to the construction industry as MBEs.

Furthermore, minority businesses could be stigmatized by the set-aside quota. Although the meaning of this term was not fully defined by the Brennan group in *Bakke, supra* at 2783, they did indicate that racial classifications "drawn on the presumption that one race is inferior to another" may be such a stigma. Notwithstanding the dearth of legislative history of the MBE provision, some statements imply that MBE's may be "inferior," that they cannot make it on their own. Representative Mitchell stated, for example:

> "to the extent we are willing to let minorities do business with the government, we will be able to reduce survival support programs now paid for by the Federal government." 123 Cong. Rec. H. 1437.

Preferential programs, such as the MBE set-aside, may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. *See Bakke,* 438 U.S. at 298. Practices which classify employees in terms of race tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. *City of Los Angeles, Dept. of Water & Power* v. *Manhart,* —— U.S. ——, 98 S.Ct. 1370, 1376 (1978). The deliberate exclusion of contractors by race, which is done even though an MBE may not be as "qualified" as a non-minority contractor, creates, in the words of Justice Douglas, *DeFunis* v. *Odegaard, supra* at 343:

> "suggestions of stigma and caste no less than a segregated classroom, and in the end may produce that result despite its contrary intention."

D. The MBE provision constitutes an unlawful bill of attainder

The Government, in response to an *Amicus* Brief, argues that the MBE provision does not constitute an unlawful bill of attainder (SOC Brief at 60-61 n.34). GBC disagrees.

Article I, Section 9, Cl. 3 of the Constitution forbids Congress from passing any law which constitutes a bill of attainder. Although derived from English history as a legislative wrath against a person's life, this Court has construed this clause as now including a protection of a person's livelihood. *See United States* v. *Brown,* 381 U.S. 437 (1965); *Cummings* v. *Missouri,* 71 U.S. 277, 320-321 (1867). These cases establish the principle

that legislative acts that apply to easily ascertainable members of a group in such a way as to inflict punishment without a judicial trial, which includes disqualification from the pursuits of a lawful avocation, are forbidden.

GBC asserts that the MBE provision has this effect. This legislative provision restricts an ascertainable class, i.e., non-minority contractors, from pursuing the opportunity to bid for, and having an opportunity to receive, work on 10 percent of the funds of each grant. There is thus a deprivation of the right to bid without the safeguard of a judicial trial. The disqualification here is from the opportunity to participate in certain government-sponsored work as a result of being categorized by Congress in a certain class. This congressional exclusion of such an identifiable class falls within the evolved scope of those legislative enactments prohibited by the bill of attainder clause.

CONCLUSION

Racial quotas have as their heritage a history of evil. They create systems of caste of the "chosen" and are dividers of society because they reject concepts fundamental to equal protection. The MBE set-aside provision is a congressionally enacted racially-based classification for distribution of certain governmental funds as a means to increase the number of minority business enterprise contractors in the construction industry and, specifically, in federally-funded projects. This provision was intended to achieve on the basis of race a parity in the construction industry between minority and non-minority businesses. Such an object is precisely what the equal protection clause was designed

to eliminate, not permit. Equal Protection commands the elimination of racial barriers, not, as Justice Douglas stated in *DeFunis* v. *Odegaard,* their creation in order to satisfy our theory about how society ought to be organized. A non-minority contractor is entitled to no advantage by reason of that fact; nor should he or she be subject to an explicit exclusion from a government benefit as a result.

Accordingly, the decision below should be reversed. The 10 percent MBE set-aside provision is not a proper exercise of congressional authority under the Constitution and it also violates the equal protection principles embodied in the due process clause of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious

prejudice in the United States. The ADL is vitally interested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the ADL has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Comm'n.* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriquez*, 411 U.S. 1 (1973); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Sante Fe Trail Transport. Co.*, 427 U.S. 273 (1976); *Regents* v. *Bakke*, 438 U.S. 265 (1978); *Los Angeles* v. *Davis*, 47 U.S.L.W. 4317 (1979); and *United Steelworkers of America* v. *Weber*, 47 U.S.L.W. 4851 (1979).

The ADL deplores the continued existence in this country of discrimination based upon race, religion and perceived national or ethnic origins. Not until the discrimination is eliminated will the United States be in fact a nation where all citizens enjoy equal opportunities, as they should. However, hastily drawn "affirmative action" statutes such as the present one, based upon a grabbag of purported racial, ethnic and language classifications, do not promote equal opportunity; rather, they foster arbitrary, divisive and in turn discriminatory action by the Federal government. Such a statute cannot be squared with the Constitution.

Indeed, as a matter of principle, just as the ADL opposes every form of discrimination based on race, religion or ethnic

origin, so too is the ADL opposed to any scheme of government preferences or benefits based upon the race, religious beliefs or ethnic origin of individuals.

STATEMENT OF THE CASE

In May, 1977, Congress enacted the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. §§ 6701-6736 (1978), which provided $4 billion in supplemental funds to be granted by the Secretary of Commerce to alleviate unemployment in the economically depressed construction industry.

Section 103(f)(2) of the PWEA contains a provision first proposed on the floor of the House of Representatives, and adopted without hearings in either House, the "minority business enterprise" requirement, which reads:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. *For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.* (Emphasis added.)

The regulations under the PWEA repeat, without elaboration, the statutory language. 13 C.F.R. § 317.2.

Petitioners are associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work who do business in the State of New York. (R. 4a-6a.) They seek injunctive relief to prevent

enforcement of the minority business enterprise provision and a judgment declaring that that provision is unconstitutional and contrary to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. (R. 17a-19a). The District Court upheld the statute, and dismissed the complaint (R. 1689).

On appeal, the Secretary of Commerce acknowledged that in enacting the minority business enterprise provision Congress created an explicitly race-based condition on the receipt of funds. 584 F.2d 600, 602 (2d Cir. 1978). The Court of Appeals held that, under the principles of equal protection embodied in the Due Process Clause of the Fifth Amendment, this racial classification was "suspect." *Id.* at 602-03. The court stated that "[u]sually when a classification turns upon an individual's racial or ethnic background, 'he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" *Id.* at 603. However, the court did not decide whether such rigid scrutiny is required here, because it found "that even under the most exacting standard of review the MBE provision passes constitutional muster," and therefore affirmed the judgment below. *Id.*

The petition for a writ of certiorari, granted by this Court, 47 U.S.L.W. 3562 (Feb. 20, 1979), presented the following questions:

1. Whether Congress' requirement that 10% of Federal grants for local public works projects be set aside for minority business enterprises is constitutionally permissible under the Due Process or Equal Protection Clauses of the Federal Constitution.

2. Whether the minority set-aside is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*

ARGUMENT

I.

THE FIFTH AMENDMENT PROHIBITS GOVERNMENTAL PREFERENCES BASED UPON CLASSIFICATIONS OF RACE, ETHNIC ORIGINS AND LANGUAGE SPOKEN.

The minority business enterprise provision sets aside government construction contracts exclusively on the basis of the race, ethnic origins or language spoken of the owners of contracting firms. This is as impermissible under due process and equal protection concepts as reserving places in a medical school class for members of preferred racial or ethnic groups, *Regents* v. *Bakke*, 438 U.S. 265 (1978). Also see *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (to grant privileges to nonwhites but to deny them to whites is an invalid denial of equal treatment under the law).[1]

Nor does the fact that Congress enacted the minority business enterprise provision render this quota permissible, because a quota remedy can never be "appropriate legislation to enforce the Equal Protection Clause," *Katzenbach* v. *Morgan*, 384 U.S. 641, 649-50 (1966). The minority business enterprise provision fences out individuals who are members of disfavored racial, ethnic and language spoken groups, a critical distinction from the legislative apportionment scheme upheld in *United Jewish Organizations* v. *Carey*,

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[1] *United Steelworkers of America* v. *Weber*, 47 U.S.L.W. 4851 (1979), is not apposite because it was limited to the legality of a private affirmative action plan under Title VII of the Civil Rights Act of 1964, and this Court specifically disclaimed any inquiry into matters of state action and the application of the Equal Protection Clause.

430 U.S. 144 (1977). The absolute lack of legislative history to support the quota means that it cannot even claim the deference which certain previous Congressional enactments have received from this Court. See *Bakke, supra,* 438 U.S. at 302 n.41 (opinion of Powell, J.).

II.

THE MINORITY BUSINESS ENTERPRISE PROVISION DOES NOT PASS ANY EQUAL PROTECTION TEST BECAUSE IT IS IMPOSSIBLE TO IDENTIFY WHICH PERSONS CONGRESS SOUGHT TO PREFER.

The minority business enterprise provision singles out six groups for preferred treatment, but fails to define them. The preferred groups are described as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." Congress did not explain what it meant by those open-ended terms, and the regulations promulgated by the Department of Commerce merely repeat the words of the statute. 13 C.F.R. § 317.2 (1978).

In this case, strict scrutiny is the proper standard of review. Classifications which deny a benefit to any individual because of race or ethnic background "are inherently suspect and thus call for the most exacting judicial examination." *Bakke, supra,* 438 U.S. at 291 (opinion of Powell, J.). Even under the less strict equal protection test, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). More recently, in *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 17 (1973), this Court said that even when strict judicial scrutiny is not required, the statute "must still be examined to determine whether it rationally furthers some legitimate, articulated

state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."

The statutory set-aside, which reestablishes the Federal government as the arbiter of racial and ethnic identity, cannot satisfy the command of the Equal Protection Clause that all statutes "affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives." *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972).

Although Congress, in enacting the minority business set-aside, was obviously attempting to direct public works contracts to certain classes of U. S. citizens deemed to be historical victims of racial and ethnic discrimination, the statutory language is neither precise nor is it tailored to achieve the supposed benign end. Indeed, the minority business set-aside cannot pass even the easiest tests of equal protection because it is impossible for those who administer the statute to determine which U. S. citizens Congress meant to prefer. For example, the term "Oriental" may be so broad as to include all those who originated in the land mass east of Egypt or it might refer to a smaller number of particular groups; *e.g.,* those originating in Southeast Asia or China or Japan. The failure to distinguish between Indians of American origin and those of Asian origin will cause obvious problems of application. It is difficult to imagine a less meaningful standard than "Spanish-speaking" for conferring preferences in government contracting. Would a person of non-Latin antecedents who is fluent in Spanish qualify? Certainly, it would be a *reductio ad absurdum* to exclude U. S. citizens born and educated in Spain from the definition of "Spanish-speaking," even though they are not generally regarded as victims of discrimination.

U.S. citizens raised in Brazil have suffered discrimination along with others of Latin American origin, but they will qualify for a statutory preference only if they speak Spanish in addition to their native Portuguese. Cf. *Moore* v. *East Cleveland*, 431 U.S. 494, 498-500 (1977) (anomalies arising from city's arbitrary definition of "family"); and *Wilson* v. *Omaha Indian Tribe*, 47 U.S.L.W. 4758, 4764-65 (1979), (Blackmun, J., concurring). This statute's jumble of unparallel terms renders the task of classifying persons and businesses inherently arbitrary and cannot meet the standard of certainty by which the due process clause measures all statutes. See, *e.g.*, *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 240 (1924) ("standard which was so vague and indefinite as really to be no standard at all"); also see *Neblett* v. *Carpenter*, 305 U.S. 297, 304 n.6 (1938).

Science has not evolved a precise definition of race or ethnicity, much less precise descriptions which can classify individuals.

> It is unlikely that the species *homo sapiens* was ever divided into "pure" races; but if it was, the fact that members of the species are both cross-fertile and migratory unquestionably means that virtually all of us would prove to be of mixed blood if the geneticists were to discover an infallible means of tracing the racial inheritance of individuals.

Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations*, 71 Yale L.J. 1387, 1421 (1962) (collecting citations).[2] See also Myrdal, An American Dilemma 136 (1944) ("the concept of the American Negro is a

[2] Many scientists have abandoned the word "race" altogether. *See, e.g.*, Livingstone, "On the Nonexistence of Human Races," The Concept of Race 46-60 (1967). Those who continue to use the word employ it only to describe general characteristics of populations, not individuals. See, *e.g.*, Dunn and Dobzhansky, Heredity, Race and Society 118 (1952) ("Races can be defined as populations which differ in the frequency of some gene or genes").

social concept and not a biological one"). "Ethnic groups" by definition do not purport to classify individuals; rather, scientists expressly developed the concept of ethnicity to describe the traits of human populations.[3]

Not surprisingly, social experience adds no precision to the racial terms which science cannot define. Montagu, *supra n.* 3, at 14. To be sure, some persons can agree about the conventional classification of many individuals into racial and ethnic groups. But for many others, there would be no consensus, and no objective method to arrive at such a classification. See *Legal Definition of Race*, 3 Race Rel. L. Rep. 571, 577-79 (1958) (collecting American cases considering proof of race).[4]

Moreover, stamping the imprimatur of the Federal government upon a particular racial or ethnic definition, and granting and withholding benefits to individuals accordingly, calls to mind notorious examples of attempts by other governments to define racial or ethnic groups, such as the Nuremburg laws in the Third Reich defining a "Jew"[5] or South Africa's laws

[3] "'[E]thnic group' is a term of heuristic value. It raises questions, and doubts, leading to clarification and discovery. The term 'race,' since it takes for granted what requires to be demonstrated within its own limits, closes the mind on all that." Montagu, The Concept of Race 17 (1967). This Court has recognized that ethnic and racial classifications stand on the same constitutional footing. *See Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

[4] Allegations of fraud with regard to eligibility for this program have received considerable publicity. *See, e.g.*, Thompson, "Minority Firms vs. Minority Fronts," The Washington Post, June 12, 1979, at C1, col. 2. The article reports claims that "Minority fronts—firms secretly controlled by white contractors—have snapped up millions of dollars worth of government construction and service contracts set aside for minority contractors. . . ." It also refers to recent convictions of two persons in connection with such a fraud.

[5] *See* Article 5 of the First Regulation under the Reichs Citizenship Law of 14 November 1935 (RGB1. I, 1333), compiled in 4 Nazi Conspiracy and Aggression 1417-PS (1946), quoted in Statutory Appendix to this Brief.

defining "White", "Black," "Coloured" and "Yellow."[6] Enforcing the set-aside establishes the government as a sort of racial Inquisition, even if for a benign purpose. Officials will be required to look beneath an applicant's self-avowed racial identity, perhaps by tracing his ancestry.[7] These problems multiply when ascertaining the racial identity of businesses, or of the stockholders of a corporation, as the statute requires.[8] The idea that a business has a discernible racial or ethnic identity is new to American law, but, unfortunately, not entirely novel in recent history. *See* Third Regulation under the Reichs Citizenship Law of June 14, 1938 (RGB1. I 627) (defining "Jewish Industrial enterprise"), summarized in Statutory Appendix.

Nor does the experience of our courts in such matters provide any comfort. *See, e.g., Sipes* v. *McGhee,* 316 Mich. 614, 25 N.W.2d 638 (1947), *rev'd on other ground sub nom. Shelley* v. *Kraemer,* 334 U.S. 1 (1948), an action to enforce a racial restriction on occupancy of realty in which the main factual issue was the racial identity of the defendants. The trial court heard testimony from experts in sociology and anthropology who testified "that there is no simple way in which

[6] Landis, *Southern African Apartheid Legislation I: Fundamental Structure,* 71 Yale L.J. 1, 4-16 (1961).

[7] The Washington Post article, *supra* at n.4, reports that one firm paid nearly $3,000 to trace the ancestry of two partners to document that they were Indians.

[8] The application of this law to corporations points up many of its absurdities. Owning a minority share of the stock may qualify as "control" within the meaning of the Federal securities laws, but under the minority set-aside provision, fully 51% of the outstanding shares must be owned by qualifying persons. This will involve continually polling the changing stockholders of publicly-held corporations that wish to qualify. No concession is made for companies managed by members of the preferred groups.

to determine whether a man is a member of the Mongoloid, Caucasoid, or Negroid race." 25 N.W.2d at 641. However, the court found that the defendants were "colored," based upon the following testimony:

> "I have seen Mr. McGhee, and he appears to have colored features. They are more darker [sic] than mine. I haven't got near enough to the man to recognize his eyes. I have seen Mrs. McGhee, and she appears to be the mullatto type."

Id. Also see *Green* v. *New Orleans,* 88 So. 2d 76 (Ct. App. La. 1956) (suit by a Negro for writ of mandamus to compel official change in the birth certificate designation of an infant girl, sought to be adopted by plaintiff, from "white" to "colored," where the court considered such evidence as love letters written from a Negro to the infant's mother, the shape of the girl's lip seam, the size of her ears, and the concentrations of pigments in "diagnostic positions of the anatomy").[9]

Even this Court could not improve upon the instinctive, "I-know-one-when-I-see-one," method of racial classification. In *United States* v. *Thind,* 261 U.S. 204 (1923), the Court ruled that a high caste Hindu was not a "white person" within the meaning of a now repealed naturalization statute. The Court recognized that to rely upon a scientific definition would mean "the substitution of one perplexity for another." *Id.* at 209. Instead, the Court interpreted the words of the statute according to "the understanding of the common man" from whose vocabulary they were taken, *id.* at 214:

[9] *See also R.* v. *Ormonde,* [1952] 1 So. Afr. L.R. 272 (1951), and *R.* v. *Gill,* [1950] 4 So. Afr. L.R. 199 (1950), examples of Anglo-Saxon jurisprudence struggling with the unscientific nature of racial tests in a jurisdiction which has adopted the abhorent policy of classifying individuals by race.

> It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Id. at 215 (Sutherland, J.). *Accord, Morrison* v. *California,* 291 U.S. 82, 86 (1933) (Cardozo, J.) ("men are not white if the strain of colored blood in them is half or a quarter, or, not improbably, even less, the governing test always . . . being that of common understanding").

References to the foregoing cases involve much more than a matter of historical interest because of the real prospect that the courts will be required, for example in cases of alleged fraud under the set-aside program, to pass on the validity of claimed status of race, ethnicity or language spoken. Statutory distinctions based upon race also demonstrate the arbitrariness of official classifications of individuals.[10] The categories created in these laws were not

[10] *See, e.g.,* Mangum, The Legal Status of the Negro 1-17 (1940); Murray, States' Laws on Race and Color (1950 and 1955 supp.) (see "Negro, definition of" under state name in index); and *Legal Definition of Race,* 3 Race Rel. L. Rep. 571 (1958). Reading this article, which calmly categorized "legal" tests for race in the business-like style of a law review, is a shocking reminder of how far we have progressed in certain aspects of race relations in the past 20 years and how unfortunate it would be to put the Federal government back in the business of classifying individuals according to their race. It is also true that the lessening of racial tensions actually increases the problems of enforcing racial classifications, for example when relaxed racial attitudes result in more frequent inter-marriage between the races.

only abhorent, but they often conflicted.[11]

Striking down the quota for minority business enterprises will not undermine the authority of *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and this Court's other racial discrimination decisions. Those cases all involved the claims by victims of racial discrimination; the actual race of the claimant was never at issue.[12] In fact, upholding the constitutionality of the set-aside would quite literally mark a return to the principles of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), which arose from an ugly quarrel over racial identity between Plessy, a person of mixed heritage who claimed that the "mixture of colored blood was not discernible in him,"

[11] *Compare* Ala. Code tit. 1, § 2 (1940) ("negro" includes a person of mixed blood descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations), *with* Tex. Penal Code Art. 493 (1947) ("negro" includes a person of mixed blood descended from negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a white person).

[12] We do not mean to say that Congress is powerless to fight the evil of racial or ethnic discrimination in the construction industry, but only that it chose an impermissible method when it enacted the minority business enterprise provision. *See Associated Gen. Contr.* v. *Secretary of Comm.,* 441 F. Supp. 955, 965-66 (C.D. Cal. 1977) (describing permissible programs, such as setting aside contracts for businesses which have experienced unemployment or low income, directing publicity to businesses in areas of low employment and familiarizing such businesses with large general contractors which customarily bid on Federal projects).

and a railroad conductor, who ordered Plessy to sit in a coach reserved by state law for colored persons. The Court upheld the constitutionality of Louisiana's statute, and stated that the matter of Plessy's race should be determined according to state law.

Decisions of this Court which have authorized the government to take race into account offer no precedent for the classifications created by the set-aside:

> "This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States*, 323 U.S. 214, and *Hirabayashi* v. *United States*, involving curfews and relocations imposed upon Japanese-Americans."

Bakke, supra, 438 U.S. at 298 n.37. (opinion of Powell, J.).[13] This Court has invalidated official racial classifications which would incite racial prejudice, *Anderson* v. *Martin*, 375 U.S. 399 (1964) (statute requiring designation on ballot of candidate's race).[14] In *Bakke*, Mr. Justice Powell's opinion, for example, contemplated at most an admissions program which is sensitive to the way that race, as one of many factors, may have affected an individual's qualifications as an applicant to medical school, without insulating the individual from comparison with all other candidates. 438 U.S. at 317-18. However, *Bakke* does not authorize tax-supported universities, let alone the Federal government, to adopt a program for identifying, and conferring benefits upon, individuals by race.

[13] Nor has experience with affirmative action plans under the EEOC yielded fixed definitions of race or ethnicity. The Commission's instructions to employers explain that the head-counting required of them does not involve anthropological or scientific definitions of race or ethnicity. EEOC, Employer Information Report (EEO-1) 5. The experience of the EEOC displays an awareness that asking a person about his race or ethnic origin can stir up animosity. Even though an employer must submit data about the racial and ethnic identity of his employees, "[e]liciting information on the race/ethnic identity of an employee is not encouraged." *Id.* If a complaint of discrimination is filed, the EEOC may regard such direct inquiries as evidence of discrimination. The preferred method for gathering such information is by *"visual survey of the work force."* *Id.* (Emphasis added.) Such a method is inherently imprecise, but it avoids directly inquiring about race or ethnicity or applying fixed definitions, problems which cannot be avoided with regard to the minority business set-aside.

[14] The employment preferences for Indians living on or near reservations are *sui generis;* they are not racial preferences but are rather efforts to further the cause of Indian self-government. *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974).

CONCLUSION

Despite its apparently benign motive, the minority business set-aside necessarily bears the burden of any official effort to identify and treat individuals as members of racial or ethnic groups: it involves the Federal government in the imprecise and dirty business of fitting persons—and enterprises—into racial and ethnic categories, and it encourages racial and ethnic factionalism by marking off certain groups for special treatment on the basis of race, ethnic origin and language spoken. This overbroad and ill-defined attempt by Congress to cut through the Gordian Knot of discrimination cannot satisfy the requirements of equal protection and due process.

Respectfully submitted,

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STATUTORY APPENDIX

1935 REICHSGESETZBLATT, PART 1, PAGE 1333.

First Regulation to the Reichs Citizenship Law of 14 Nov. 1935, translation appearing in 4 Nazi Conspiracy and Aggression 1417-DS (1946):

"On the basis of Article 3, Reichs Citizenship Law, of 15 Sept. 1935 (RGB1. I, page 146) the following is ordered:

• • • • •

Article 5

"1. A Jew is anyone who descended from at least three grandparents who were racially full Jews. Article 2, par. 2, second sentence will apply.

"2. A Jew is also one who descended from two full Jewish parents, if: (a) he belonged to the Jewish religious community at the time this law was issued, or who joined the community later; (b) he was married to a Jewish person, at the time the law was issued, or married one subsequently; (c) he is the offspring from a marriage with a Jew, in the sense of Section 1, which was contracted after the Law for the protection of German blood and German honor became effective (RGB1. I, page 1146 of Sept. 1935); (d) he is the offspring of an extramarital relationship, with a Jew, according to Section 1, and will be born out of wedlock after July 31, 1936."

1938 REICHSGESETZBLATT, PART 1, PAGE 627.

Third Regulation under the Reichs Citizenship Law of June 14, 1938, summary appearing in Hilberg, The Destruction of the European Jews (1967):

"This decree provided that a business was Jewish if the proprietor was a Jew, if a partner was a Jew, or if, on January 1, 1938, one of the Vorstand or Aufsichtsrat [board of directors] members was a Jew. Also considered Jewish was a business in which Jews had more than one-fourth of the shares or more than one-half of the votes, or which was factually under predominantly Jewish influence. A branch of a Jewish business was declared Jewish, and a branch of a non-Jewish business was considered Jewish, if the manager of the branch was a Jew."

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No. 78-1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERALD N. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERALD N. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) contains the following minimum 10% minority business set-aside requirement:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

INTEREST OF THE *AMICUS CURIAE*

This case presents a question of major importance to federal grantees and contractors throughout the United States, including EEAC members, who are subject to a number of federal minority business assistance programs and their affirmative action and minority business subcontracting requirements.[1] At issue is whether a statutory scheme designed to remedy an underrepresentation of minority owned and operated businesses in certain segments of the economy by requiring that a percentage of federal funds expended be reserved exclusively for certain minority group members is constitutional where there has been no determination, legislative or otherwise, of past

---

[1] Such programs include Executive Order No. 11458, 34 Fed. Reg. 4937 (1969), as amended by Executive Order No. 11625, 36 Fed. Reg. 19962 (1971) ("E.O. 11625"), which requires that Federal executive agencies develop plans and programs to encourage minority business enterprise; Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ["4R Act"], and its implementing regulations [49 C.F.R. Part 265], which prohibit discrimination on the basis of race, color, national origin or sex in the participation in, or benefits of, any program funded by the 4R Act, and requires the Federal Railroad Administration and its recipients to take affirmative action to assist minority-owned businesses in the programs set up by that Act; and Section 8(d) of the Small Business Act, 67 Stat. 232, 15 U.S.C. § 631, as amended by Pub. L. No. 95-507, 92 Stat. 1757 (1978), which requires recipients of federal contracts exceeding one million dollars for construction and $500,000 for other purposes to develop and have approved subcontracting plans for small and "socially and economically disadvantaged" businesses.

discrimination, other than a possible finding of generally low minority business representation.

Initially, we wish to note that there exists a strong commitment among EEAC members to promote the goal of equal opportunity for women and minorities. Many EEAC members are members of organizations designed to promote minority purchasing; engage in vendor and buying education; identify minority vendors and establish vendor information exchanges. EEAC members are dedicated to equal opportunity and have evidenced that conviction in a variety of programs and activities. EEAC strongly supports the concepts of equal employment opportunity and affirmative action, but has serious concerns about the constitutional authority of the Congress to compel the adoption of rigid racially-based quotas.

Organizationally, EEAC is concerned primarily with equal employment opportunity ("EEO") laws and policies and typically confines its activities to this area.[2] However, because both judicial and adminis-

[2] EEAC is a nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment issues. See, e.g., *United Steelworkers of America, AFL-CIO-CLC*

trative bodies (including the court below)[3] have relied increasingly upon the use of affirmative action programs in EEO-related regulations and cases to justify minority business set-asides, the need to clarify conceptual relationships between these two areas has grown accordingly. Indeed, because the Court is reviewing a statute which may well require the articulation of constitutional standards for evaluating government-sanctioned racial and ethnic preference programs solely on the basis of underrepresentation, its decision could have far-reaching consequences for governmental affirmative action programs that require employers to rectify an underrepresentation of minorities in their workforces. With these concerns in mind, we submit this brief in order to explicate the constitutional problems raised by the minority business set-aside legislation reviewed herein, not

v. *Brian F. Weber*, 47 U.S.L.W. 4851 (U.S. June 27, 1979); *Great American Federal Savings Association, et al.* v. *Novotny*, 47 U.S.L.W. 4681 (U.S. June 11, 1979); *The Regents of the University of California* v. *Allan Bakke*, 438 U.S. 265 (1978); *County of Los Angeles* v. *Van Davis*, 47 U.S.L.W. 4317 (U.S. March 27, 1979); *Furnco Construction Corporation* v. *Waters*, 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *United Air Lines* v. *Evans*, 431 U.S. 553 (1977).

[3] 584 F.2d 600, 607-609. *See also* "Participation by Minority Business Enterprise in Contracts and Programs Funded by the Department of Transportation," Notice of Proposed Rulemaking, 44 Fed. Reg. 28928, 28931 (May 17, 1979).

Similar parallels have occurred between equal employment and equal educational opportunity issues. See *The Regents of the University of California* v. *Allan Bakke*, 438 U.S. 265 (1978).

only in the context of federal assistance and procurement law, but in the area of EEO law as well.

THE FACTS AND DECISION BELOW

The petitioners are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. They sought declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the minority business set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2). That section mandates that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." A minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members. . . ." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 584 F.2d at 601.

The district court denied their petition and dismissed the complaint, holding that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry. In doing so, the court summarized the history of the MBE requirement. The set-aside amendment, it was noted, was part of an act which extended the provisions of Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999-

1012 (1976), under which Congress appropriated two billion dollars to stimulate the national economy and the sagging construction industry by providing direct grants to state and local governments for the construction of public facilities which would immediately create a substantial number of jobs. From an additional authorization of four billion dollars for construction projects, Congress subsequently appropriated two billion dollars under a "Round Two" of the Local Public Works Program. The minority business enterprise (MBE) set-aside requirement was incorporated into Round Two as the result of an amendment introduced on the floor of the House of Representatives by Congressman Parren Mitchell of Maryland.

Because the MBE requirement distinguishes among various business enterprises on the basis of race—an inherently "suspect" classification—the court applied "rigid scrutiny" to determine whether there was a compelling government purpose for the classification, and whether the means chosen to effectuate the purpose was the least intrusive alternative. First evaluating whether a compelling interest for the racial classification existed, the court cited several statements by the amendment's sponsor and supporters to the effect that minority businesses are underrepresented in public contract awards. It conceded that "It is true that these statements do not expressly attribute the difficulties encountered by minority business enterprises to prior racial discrimination," but noted that "but whatever ambiguity is present is easily resolved when the available empirical data is examined." 443 F. Supp. 253, 258. The court proceeded to quote from: (1) an unrelated report on

minority business opportunities by the Commerce Department concerning the "historic exclusion" of minority entrepreneurs from the mainstream economy; and (2) an unrelated report concerning the preclusion of minority businesses, particularly in the construction industry, prepared during the previous Congressional session by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise. *Id.* at 258-259. The court thereupon concluded that in enacting the MBE requirement, Congress had sought to remedy prior racial discrimination, and thus had satisfied the compelling government interest test.

With respect to whether the MBE set-aside constituted the least intrusive means to accomplish increased utilization of MBEs, the court conceded that "[a]ny reduction in the percentage of minority business participation required under the Act would, of course, result in reduced channeling of funds to the detriment of nonminority businesses and therefore less discriminatory impact." *Id.* at 262. (Citation omitted). However, after discussing what it considered to be the ineffectiveness of the Section 8(a) program of the Small Business Administration (see pp. 27-32, *infra*), and after weighing different definitional or percentage formulas for hypothetical MBE set-asides, the court concluded that the existing MBE set-aside requirement "cannot be considered unreasonable in view of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises." *Id.*[4]

[4] The district court also considered, and then rejected, the petitioners' claim that the MBE set-aside conflicted with the

On appeal, the Second Circuit Court of Appeals affirmed the judgment of the district court, finding that "even under the most exacting standard of review the [minority business set-aside] provision passes constitutional muster." 584 F.2d 600, 603. The Second Circuit agreed with the district court that specific findings of past discrimination to justify the set-aside were unnecessary. Citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 656 (1966), the court declared that it is " 'enough that [the court] perceive a basis upon which Congress might predicate a judgment that the MBE amendment would remedy past discrimination against minority construction businesses." 584 F.2d at 604-605. While admitting that explicit findings of past discrimination do not appear in the relevant committee reports, the Second Circuit found the record "not entirely silent," and held that the finding of past discrimination on the basis of the floor statements and unrelated administrative and legislative reports adumbrated in the district court opinion were sufficient to justify the set-aside. 584 F.2d at 605-607.

In evaluating the equitable limitations placed upon fashioning remedies for past discrimination, the Second Circuit looked to its previous decisions in the equal employment opportunity area. The court noted that the effects of "reverse discrimination" as a remedy should not be concentrated upon a small ascertainable group of non-minority persons. *EEOC*

Civil Rights Acts of 1866 and 1964, 42 U.S.C. §§ 1981, 1983 and 1985; 42 U.S.C. §§ 2000d and 2000e *et seq.* (1970). Although the same statutory challenge apparently was raised before the Second Circuit (Cert. Pet. 13), the decision of the Court of Appeals makes no reference to it.

v. *Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). Finding that the MBE set-aside extended to only .25 percent of the funds expended yearly on construction work in the United States, the Second Circuit concluded that because "nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run." 584 F.2d at 608.

SUMMARY OF ARGUMENT

The Second Circuit's determination that the minimum 10% MBE set-aside in the Public Works Employment Act of 1977 is not unconstitutional is incorrect for two reasons: (1) the racially-based set-aside is unaccompanied by specific legislative findings of prior discriminatory acts, *Regents of the University of California* v. *Allan Bakke*, 438 U.S. 265 (1978); and (2) assuming the existence of a compelling government interest, the Second Circuit failed to conduct adequately the constitutionally-mandated inquiry whether the set-aside, being an extreme form of relief, was necessary and the least discriminatory means available to accomplish the legislative objective, *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Dunn* v. *Blumstein*, 405 U.S. 330, 342-343 (1972). Had it done so, it should have reached a contrary result. *Cf. Associated General Contractors of Calif., et al.* v. *Secretary of Commerce*, 441 F.Supp. 955 (C.D. Cal. 1977), *judgment vacated and remanded*, 46 U.S.L.W.

3892 (U.S. July 3, 1978), *original judgment reinstated in full*, 459 F. Supp. 766 (C.D. Cal. 1978), *juris. statement pending*, Nos. 78-1107, etc.

I

Citing *Regents of the University of California* v. *Bakke, supra*, the Second Circuit properly determined initially that the minimum 10% MBE amendment "is permissible only if it is a remedy for past discrimination." 584 F.2d at 603. Moreover, the *Amicus* agrees with the government that, in accordance with *Bakke*, "[d]ifferences in the congressional findings supporting any new minority business enterprise provisions and in the degree and kind of the minority preference may make a significant difference in the constitutional analysis. . . ." (Memo for the Sec. of Commerce Opposing Cert. at 11). What the Second Circuit's decision fails to illustrate, and what the government cannot afterwards substantiate, is the existence of *any* legislative findings of past discrimination at all. Instead, the Second Circuit itself inferred such past discrimination only on the basis of the provision's self-evident purpose in assisting minority contractors. Although this analysis explains the amendment's goal, it does not enhance the underlying justification for its pursuit. When the Second Circuit did search for legislative findings of evidence of past discrimination, it found little reference to it during floor debate and none in the committee reports; yet, paradoxically, the court interpreted the lack of findings itself as proof that past discrimination existed.[5] This hardly qualifies as a

[5] Because the minimum 10% MBE amendment was introduced on the House floor, the Court found absence of its dis-

valid Congressional exercise of its "special competence to make findings with respect to the effects of identified past discrimination." *Regents of the University of California* v. *Bakke*, 438 U.S. at 302 n.41 (Powell, J.). In fact, on this record, there are no findings that MBEs have been denied the same right to contract with federal grantees as nonminority businesses. Thus, no compelling government interest has been established to justify the highly suspect action Congress herein has undertaken.

II

Even assuming that the requisite findings were made, moreover, the Second Circuit failed to engage in the constitutionally-mandated inquiry whether the set-aside entailed the least discriminatory alternative to achieving a valid legislative purpose. Without investigating in any way whether Congress could have used less intrusive means, the court determined that because the set-aside comprised a small fraction of the funds expended yearly on construction work, it represented a "minimal frustration" to nonminority contractors, and thus was constitutional. 584 F.2d at 607-608. The Court thereby overlooked the *nature* of set-asides, as opposed to their quantitative impact. In so doing, no acknowledgement was made that set-asides, *in and of themselves*, constitute an extreme remedy and ordinarily should be used only as a last

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cussion in committee reports "not surprising." 584 F.2d at 605. "Furthermore," the Court added, "the lack of extended discussion [on the House floor] clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry." *Id.* at n.10.

resort, even when imposed by courts enforcing remedial civil rights statutes, *Lewis* v. *Tobacco Workers, Local 203*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3455 (U.S. Jan. 9, 1979). *Kirkland* v. *New York State Dept. of Correctional Services, supra; Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977); *Dawson, et al.* v. *Pastrick, et al. and East Chicago Firefighters Ass'n*, —— F.2d ——, 19 EPD ¶ 9270 (7th Cir. May 31, 1979).

Had the Second Circuit conducted such an inquiry, it would have found, as did the district court in *Associated General Contractors of California* v. *Secretary of Commerce, supra*, 459 F. Supp. 766, that less intrusive means of promoting employment of minority group contractors existed than the "10% racial quota" and thus, as in *Bakke*, the amendment was not a "necessary" means to promote a legitimate, substantial interest. *Id.* at 780-781.

III

In sum, "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which . . . results in racial discrimination." *Lau* v. *Nichols*, 414 U.S. 563 (1974), quoting 110 Cong. Rec. 6543 (1968). Without legislative findings of MBE exclusion from federal assistance-related contracting opportunities, *cf. United Steelworkers of America* v. *Weber*, 47 U.S.L.W. 4851, 4852, n.1 (1979), the minimum 10% MBE set-aside fails to withstand scrutiny, for it clearly establishes racial eligibility for a portion of federal grant funds

even though no past act of discrimination is remedied thereby. In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court professed difficulty in understanding how a racially neutral application for employment —there an aptitude test—could violate equal protection guarantees "simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 426 U.S. at 245. Similarly, the *Amicus* submits that where Congress enacts a federal program in which a portion of the contract dollars to be spent is strictly reserved for certain minority group members on the basis only of underrepresentation, such a statute inevitably violates the equal protection guarantees inherent in the Due Process Clause of the Fifth Amendment.

ARGUMENT

I. IN THE ABSENCE OF FINDINGS OF PAST DISCRIMINATION, A RACIALLY-BASED SET-ASIDE FOR MINORITY BUSINESS PARTICIPATION IN PUBLIC WORKS PROGRAMS IS WITHOUT A COMPELLING GOVERNMENT INTEREST, AND THUS IS UNCONSTITUTIONAL.

A. Congress did not articulate specific legislative findings of prior discriminatory acts to justify a racially-based set-aside.

1. *The Legislative history*

As the Second Circuit noted (see n.5 *supra*), the minimum 10% MBE amendment was not introduced until the Public Works Bill of which it is a part was being considered on the floor of the House of Representatives, and thus, there is no relevant discussion of the proposal in the committee reports. Although there was some brief debate of the amendment on the

House and Senate floors, it is obvious upon examination of the legislative record that Congress was not seeking to remedy any specific acts of past discrimination.

The amendment was introduced on the floor of the House of Representatives by Representative Parren Mitchell (D-Md.) ("Mitchell amendment") on February 24, 1977. In his opening statement, Rep. Mitchell flatly declared that the purpose of the amendment "is to provide that those who are in minority businesses get a fair share of the action from this public works legislation." 123 Cong. Rec. H 1436 (daily ed. Feb. 24, 1977). This purpose had as its *underlying justification* a statistic proferred by Rep. Mitchell that even with pre-existing government programs designed to assist minority businesses, they received annually only one percent of all government contracts. *Id.* at H 1436-37. Declaring his amendment "the only sensible way for us to begin to develop a viable economic system for minorities," the Congressman spent the greater portion of his remarks responding to anticipated objections to the proposal, namely, that set-asides are not legitimate; that the competitive bid process would suffer; and that the set-aside would cause contract award delays. In response to these potential arguments, he asserted, in turn, that the SBA Section 8(a) program (see pp. 27-32, *infra*) as well as state programs in his state and others proved that set-asides were legitimate; that minority businesses just getting started generally cannot compete against established companies; and that lists of minority companies are available so that no delay will be caused in attempting to locate them. *Id.* No reference was made to any instances of discrimination

against minority contractors by either nonminority contractors or government agencies.[6]

In support of the Mitchell amendment, Rep. John Conyers (D.-Mich.) complained that "minority contractors and businessmen who are trying to enter in on the bidding process . . . get the 'works' almost every time." The reason for this, he explained, is that:

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[6] Congressman Mitchell's opening statement was followed by several colloquys between Rep. Mitchell and other members of Congress. They may be summarized as follows:

Rep. Abraham Kazen (D.-Tex.) asked whether the Mitchell amendment would be mandatory and, if so, whether it would apply to those rural areas where minority businesses were nonexistent. Rep. Mitchell responded, in effect, that the Secretary [of Commerce] would have discretionary authority to make adjustments to the requirement. *Id.* at H 1437.

Rep. Robert Roe (D.-N.J.), acting upon Rep. Kazen's expressed concern, then introduced an amendment to the proposal which articulated the discretionary authority the Secretary would have in imposing the minimum ten percent requirement on grantees. The amendment was accepted by Rep. Mitchell. *Id.* at H 1438.

Rep. William Harsha (R.-Ohio) sought clarification of Rep. Roe's amendment to the Mitchell amendment, and upon receiving assurances that discretion would be exercised, did not pursue the matter further. *Id.* at 1439.

Rep. Don H. Clausen (R.-Cal.) asked whether the Mitchell amendment was necessary since Rep. Mitchell had indicated previously that his home state was making good progress in developing minority business opportunities. Rep. Mitchell acknowledged the progress being made in his own state, but declared, in effect, that the problem of underutilization was national in scope and therefore required a national response. *Id.* at 1439-40.

> "The bidding process is one whose intricacies defy the imaginations of most of us here. The sad fact of the matter is that minority enterprises usually lose out, and subsequently end up in a congressional office or some other unlikely place complaining bitterly. Not all of them come to the offices of members of the congressional Black Caucus either, because many other Members have had the same dismaying experience of trying to give solace to small businessmen who through no fault of their own simply have not been able to get their foot in the door." *Id.* at H 1440.

Rep. Conyers then proceeded to agree that the Mitchell amendment should not apply to those districts that did not have minority enterprises. *Id.* at H 1440.

Rep. Donald Pease (D.-Ohio) then inquired whether the Mitchell amendment would interfere with state competitive bidding requirements, whether minority businesses would receive contracts even when they were not the low bidders, and whether the minority requirement would cause delay in the implementation of the public works program. Rep. Roe did not answer directly any of the proferred questions, but simply reiterated the basic requirement of the Mitchell amendment. *Id.*

Finally, Rep. Mario Biaggi (D.-N.Y.) made a statement in support of the Mitchell amendment, as amended. Finding that the amendment's objective is "to guarantee to minority business enterprise that they too will benefit from the passage of this legislation," Rep. Biaggi concluded House debate on the Mitchell amendment by discussing general socio-

economic statistics. He indicated that the rate of minority group unemployment and MBE dissolution was high and that the percentage of Federal procurement contracts for MBEs was low. The set-aside requirement was justified, according to Rep. Biaggi, because it would go "a long way" in promoting economic "equality" and "parity." *Id.*

The amendment, as amended, was then adopted.

On March 10, 1977, Senator Edward Brooke (R.-Mass.) introduced a minimum 10% MBE provision in the Senate. Its language basically conformed to the Mitchell amendment.[7] Senator Brooke stressed that the provision would relieve the chronic unemployment in minority communities, because minority companies draw their work forces primarily from such areas. He too pointed out that the set-aside concept had been used in the past, namely, in the SBA's Section 8(a) program, and in the Railroad Revitalization Act's minority resources centers. In response to a question from Sen. John Durkin (D.-N.H.), Senator Brooke explained that the minority business provision would not require states with insignificant minority populations and businesses to go out of state to find minority businesses. The amendment was then approved. 123 Cong. Rec. S 3909-10 (daily ed. March 10, 1977).

[7] Senator Brooke's version contained an additional separate clause concerning areas with insignificant minority populations. The House-Senate Conference, however, adopted the House version. HOUSE CONF. REP. No. 230, 95th Cong., 1st Sess. 11 (1977).

2. Constitutional implications of the legislative history.

The pivotal facts that emerge from the congressional debate on the minimum 10% MBE amendment, together with their accompanying constitutional consequences, can be summarized by evaluating in turn what was and was not expressed by Congress:

(1) Some members of Congress (Mitchell, Conyers, Biaggi) articulated indisputably their concern that minority businesses were not receiving an adequate share of the federal procurement dollar. They declared, in effect, that MBEs were underutilized, and thus they sought by way of the minimum 10% MBE provision to correct this underutilization. Were this the only purpose that could be extracted from the debates, i.e., to assure a specified percentage of federal procurement participation of a particular group merely because of its racial or ethnic origin, "such a preferential purpose must be rejected not as insubstantial but as facially invalid." *Regents of the University of California* v. *Bakke*, 438 U.S. at 307 (Powell, J.). As Justice Powell declared, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* (Citations omitted.) [8]

[8] In the equal employment opportunity area, it should be noted, this Court has repeatedly indicated that where past discrimination by a specific employer has not been shown to have been a factor contributing to a racial imbalance between an employer's workforce and the workforce in the appropriate labor market, preferential hiring of minorities to cure the imbalance cannot be *required. United Steelworkers of America, AFL-CIO-CLC* v. *Brian F. Weber*, 47 U.S.L.W. at 4855; *Cf. Dayton* v. *Brinkman*, 47 U.S.L.W. 7944 (U.S. June 26,

There should appear little doubt, however, that these same members of Congress had as an underlying purpose an intent to correct what they saw as inequities in the federally-related procurement process. By concentrating exclusively upon gross numbers to illustrate their point, they apparently sought to establish that minority businesses *generally* were not receiving an adequate share of the federal assistance contract dollar. They further implied that the root cause of this inadequacy stemmed from a lack of sophistication (*e.g.*, Conyers at Cong. Rec. H 1440, *supra*) in dealing with the "intricacies" of the federal procurement process—a sophistication presumptively enjoyed by well-established companies, the overwhelming majority of which are owned and operated primarily by "nonminority persons." Although such a purpose might under the circumstances be characterized as "benign," the hidden inequities inherent in preferences perceived as "benign," [9] as

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1979). As stated in *Furnco Construction Corp.* v. *Waters*, 46 U.S.L.W. 4966, 4970 (1978) the obligation imposed upon employers is to provide "an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." See also *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424, 430 (1971) ("In short, the Act does not *command* that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.") (Emphasis added.)

[9] As Justice Powell stated in *Bakke*:

> There are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 343 (DOUGLAS, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

well as the constitutional difficulties in denying equal protection challenges where the "amorphous concept" of remedying "societal discrimination" is the goal are well known. *Regents of the University of California* v. *Bakke*, 438 U.S. at 307. In sum, such generalities would not meet the compelling government interest required of racial classification, for this Court has "never approved a [governmental] classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory

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438 U.S. at 298. *Cf. Swann, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, 16 (1971) ("To [prescribe a ratio of Negro to white students reflecting the proportion for the district as a whole] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.") (Emphasis added.) *Accord, Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974). *See also Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977); 47 U.S.L.W. 4944 (U.S. June 26, 1979).

violations." *Id.* at 307, citing *Teamsters* v. *United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 155-156; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1966). To the contrary, under the circumstances here, only where there has been exercised "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." 98 S. Ct. at 302 n.41, would such racial classifications withstand scrutiny. This leads us to one final observation, and its constitutional consequences.

(2) We have at this point *exhausted* the legislative history of the minimum 10% MBE amendment. No "detailed legislative consideration of the various indicia of previous constitutional or statutory violations" [10] exists. Yet, this complete lack of any explicit findings of past discrimination was determined by the Second Circuit not to be fatal to the legislation's constitutionality, but merely "troublesome." 584 F.2d at 605. The Second Circuit found that Rep. Conyers' statements referred to past discrimination, and that this "finding" was buttressed by such discrete authorities as a Commerce Department Handbook on minority business opportunities and an unrelated House report from the previous Congressional session. *Id.* at 606. Even these authorities, however, are so seriously compromised by generalities concerning "historical exclusion" that evidence of *past discrimination*, as opposed to under-participation, still do not appear "on the record," even in the text of the district and circuit court opinions below.[11] Except for a possible finding of underrepresentation, when Congress enacted the legislation, it did not *in fact* find, even in a solely conclusory manner, that minority businesses had been *excluded* from procurement opportunities.

[10] 438 U.S. at 302 n.41, citing *South Carolina* v. *Katzenbach*, *supra*.

B. The set-aside program has been enforced inflexibly with a view toward neither detecting discriminatory acts nor formulating appropriate remedies.

In *Regents of the University of California* v. *Bakke*, *supra*, Justice Powell indicated approval of legislative schemes where "there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations . . . (citation omitted), *and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies.* See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976)." 438 U.S. at 302 n.41 (emphasis added). Similarly, Justice Brennan declared that the court opinions in *Bakke* stood

[11] Neither of the extraneous sources cited by the Second Circuit (and, in the first instance, by the district court) contain anything other than conclusory statements. Thus, the Commerce Department Handbook's conclusion that "the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical *exclusion* from the mainstream economy" (emphasis added) is found to constitute an "ample basis" for Congress to conclude the same. 584 F.2d at 606. Likewise, the House report cited refers to a "business system which has traditionally excluded measurable minority participation" without so much as a hint of specificity, except in that it finds minority business participation particularly low in the construction industry. *Id.*

for "the central meaning" that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantage cast on minorities by past racial prejudice, *at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.*" *Id.* at 325. (Emphasis added.) Implicit in the Court's language is the need, mandated by law, not only to articulate the wrongs to be remedied, but to carefully fashion remedies *as they are required.* The rigidity of the minority business set-aside here reviewed, however, is reflected not only in the total lack of legislative findings to support its enactment, but in the inflexible manner in which it has been enforced.

As indicated earlier in this brief, the set-aside amendment was amended once during floor consideration in the House to give the Secretary of Commerce discretion in the application of the provision. Such discretion supposedly would be used in rural areas with insignificant minority populations, or as a vehicle for accommodating conflicting state or local public contract laws. Whatever discretion the Secretary could reasonbly be said to enjoy under the provision, however, certainly has not been reflected in subsequent administrative guidelines. In the "Guidelines for 10% Minority Business Participation in LPW Grants" ("Guidelines"), the Secretary of Commerce declared that the Economic Development Administration (EDA) of the Commerce Department would "enforce the 10% MBE participation requirement strictly" (Guidelines at 1), and that "a Grantee situated in an area where the minority population is very small may apply for a waiver before requesting

bids on its project or projects if it can show that there are *no* relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project." *Id.* at 15 (emphasis added).[12] With respect to potential conflicts with state or local public contract laws, the guidelines have been equally inflexible:

> "Some state or local laws involving bidding procedures or other matters may make fulfillment of the 10% MBE requirement difficult for some Grantees. *It is the responsibility of each Grantee to find ways of achieving 10% MBE participation regardless of such laws.* If qualified, *bona fide* MBEs are available, *EDA will not grant a waiver of the 10% MBE requirement because of difficulties caused by state or local law.*" Guidelines, at 14 (emphasis added).

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[12] The difficulty of obtaining a waiver from the minimum 10% MBE requirement is illustrated again later in the guidelines:

> Only the Grantee can request a waiver. Ordinarily a waiver request will be considered only after the Grantee and its prime contractors have taken every feasible action to achieve at least 10% MBE participation. For example, if the Grantee or its prime contractors have taken all feasible steps to locate relevant MBE's and have requested all available qualified MBE's to participate as contractors, subcontractors or suppliers and not enough MBE's can or will participate to reach the 10% MBE participation goal, a waiver request detailing the efforts of the Grantee and its prime contractor may be necessary in order for the project to proceed. Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful.

Guidelines for 10% Minority Business Participation in LPW Grants, at 14-15.

As the Comptroller General has indicated, "[a]lthough EDA was granted broad discretion in implementing the provision, it elected to enforce it stringently by not granting early waivers." "Minority Firms On Local Public Works Projects—Mixed Results," COMP. GEN. REP. CED-79-9 at 38 (Jan. 16, 1979). One result has been that two district courts were compelled to find the minimum 10% MBE provision unconstitutional as applied within their districts. See *Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977), and *Montana Contractors Association* v. *Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1979), appeal dismissed, 47 U.S.L.W. 3810 (U.S. June 19, 1979). *See also Associated General Contractors of California* v. *Secretary of Commerce, supra* (MBE provision unconstitutional on its face). Although, as the Government notes (Memo. of Sec. of Commerce in Opposition, at 8 n.3), other courts were not disturbed by the program's inflexibility, it cannot be gainsaid that the minimum 10% MBE provision was enacted with a degree of rigidity that administrators subsequently determined to be nearly absolute.

The administration of the minimum 10% MBE provision thus reinforces the conclusion that the racially-based set-aside was not enacted to remedy findings of specific past discrimination, but rather was understood as a vehicle for distributing government funds to achieve a degree of racial balance in the participation of various businesses. But since racial classifications are "presumptively invalid," "regardless of purported motivation," and can be upheld "only upon an extraordinary justification," *Personnel Administrator of Mass., et al.* v. *Helen B. Feeney*, 47 U.S.L.W. 4650, 4654 (U.S. June 5, 1979), the *Amicus* submits that the legislative history of the MBE provision, being devoid of specificity, falls short of achieving this unequivocally high standard, and thus exposes a constitutionally fatal flaw in the MBE provision's enactment.

C. The absence of a compelling government interest to support the imposition of a rigid, racially-based set-aside is further evidenced by the nature of other minority business assistance programs.

The government argues that the minimum 10% MBE provision is one among a number of statutes "designed to eliminate discrimination from federally funded programs and from particular areas of the economy or other spheres of activity in which the federal government has a substantial interest." (Jurisdictional Statement of U.S. at 19.) Although the Government then cites a number of economic assistance and civil rights statutes, it fails to indicate that none of these other statutes includes a rigid racially-based set-aside to be enforced without consideration to remedying past acts of discrimination.

Likewise, the Government has argued that the Small Business Act's Section 8(a) program, which "has been upheld on several occasions" (Juris. Statement of U.S. at 20-21), further supports the use of racially-based set-asides. The Section 8(a) program, it should be noted, has been invoked by several courts [including the district court below, 443 F. Supp. at 260] to uphold the legislation here challenged, and sponsors of the legislation in both the House and Senate did in fact rely upon the legitimacy of the Section 8(a) program as precedent [123 Cong. Rec.

at 1437 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell) and 123 Cong. Rec. at 3910 (daily ed. March 10, 1977) (remarks of Sen. Brooke)]. Because of this heavy reliance on Section 8(a) of the Small Business Act, the *Amicus* herein urges the Court to consider the following brief analysis of the Section 8(a) program, which, we submit, demonstrates that it does not constitute precedent for the legislation here challenged, but, to the contrary, raises further questions about its constitutionality.[13]

Unlike the legislation challenged here, Section 8(a) of the Small Business Act, 67 Stat. 232, 15 U.S.C. §§ 631-647, on its face has never defined eligibility for federal assistance in strictly racial or ethnic terms. Until its amendment in 1978, which created a statutory standard, eligibility under the Section 8(a) program was defined by administrative regulation in terms of social and economic deprivation, and used certain racial and ethnic classifications to illustrate likely beneficiaries.[14] According to a report

[13] Both Congress and the courts have cited other minority business assistance programs, among them the executive order program under OMBE (E.O. 11625, *supra* note 1) and the Department of Transportation minority business program (see *supra* note 1). These and other programs like them are sufficiently dissimilar from the legislation here challenged to merit attention only in a latter section of this brief, Part II, which indicates the less intrusive alternatives Congress has at its disposal for remedying the underutilization of MBEs.

[14] The Small Business Administration had defined the business concerns eligible for this program as follows:

> "An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of *social or economic disadvantage*. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, Oriental-Americans, Eskimos, and Aleuts. Vietnam-era service in the Armed Forces may be a contributing factor in establishing social or economic disadvantage." 13 C.F.R. Part 124.8-1(c) (1977) (emphasis added).

by a Section 8(a) review board, however, less than 4% of 8(a) companies in the then current portfolio were owned by persons not within the racial and ethnic categories stated specifically in the regulations.[15]

The constitutionality of the Section 8(a) program has been challenged primarily on the grounds that, as administered, it favors applicants from certain racial and ethnic groups, and thus violates the equal protection rights of nonminority contractors. These challenges have yet to resolve the issue conclusively. In *Kleen-Rite Janitorial Services, Inc.* v. *Laird*, unreported, No. 71-1968 (D. Mass., Sept. 21, 1971), the court held that competitive bidding is not required under Section 8(a) and that the program does not violate the Fifth Amendment because the class of persons eligible is not defined racially but by social or economic disadvantage. This important distinction was indicated again unequivocally in *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 334 F. Supp. 194 (S.D. Fla. 1971), *rev'd*, 477 F.2d 696, *reh'g denied*, 478 F.2d 1403 (5th Cir.), *cert. denied*, 415 U.S.

[15] See "Report and Recommendations on the Section 8(a) Program for A. Vernon Weaver, Administrator SBA" at 23 (§ 8(a) Review Board, January 31, 1978).

914 (1978), where the constitutionality of the program was left in doubt precisely because of its racial impact.[16]

Contrary to the implications in the Government's brief, as well as statements by Members of Congress and the opinions of some lower courts, cases such as *Ray Baillie* and *Kleen-Rite* reflect uncertainty over the program's legality. Indeed, such cases could indicate that Section 8(a) may be constitutionally permissible only when read as permitting all disadvantaged persons to apply for its benefits on an equal basis. In defending the program, commentators have taken care to note that the term "disadvantaged" should be considered a colorblind criterion for purposes of legal justification.[17]

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[16] In *Ray Baillie*, a small business engaged in refuse hauling challenged the private placement of subcontracts for refuse disposal by the Administrator of the Small Business Administration and the Secretary of the Air Force. Although the district court's decision that subcontracts under Section 8(a) could not be awarded noncompetitively was overturned on appeal, the constitutional issue was not addressed by the appellate court because plaintiffs were found to lack standing, 477 F.2d at 709. The district court specifically found, however, that the Section 8(a) program was violative of equal protection of the laws because "the primary criterion for eligibility is race, color, or ethnic origin," and the [p]laintiffs have been excluded from consideration because of their race." 334 F. Supp. at 202.

[17] That the Section 8(a) could be so justified would rest upon a finding that it did not in fact incorporate a racial or ethnic test:

> ". . . there is broad authority in the Economic Opportunity Act of 1964 for agencies of the Government—the Small Business Administration particularly—to use their

It should be noted as well that the 1978 amendments to the Small Business Act, Pub. L. No. 95-507, 92 Stat. 1757 (1978) ("the Act"), maintained the program's emphasis on disadvantaged status. Eligibility for the program was for the first time statutorily defined in terms of "socially and economically disadvantaged individuals." Whereas Congress made a finding that socially disadvantaged individuals "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities" (the Act, § 201), it nevertheless defined social disadvantage generally as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." The Act, § 202.

The *Amicus* submits that whatever the legality of the Section 8(a) program, or other minority business programs described below, the legislation challenged here enjoys *none* of the potentially legitimizing characteristics of other programs. Unlike the Small Business Act, the legislation contains rigid set-aside requirements based exclusively upon racial and ethnic considerations. Moreover, as shown below, when the

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> related programs in a way to compliment and advance the purposes of this Act—helping the disadvantaged. This category often includes, but is *not* restricted to, Black Americans, American Indian, Spanish Americans, Oriental Americans, Eskimo and Aleuts. It *is not limited to any particular racial group.*"

Knebel, *Legal Basis for SBA's Minority Enterprise Program*, 30 FED. B.J. 271, 276 (1971) (emphasis added); *Cf.* Comment, *Minority Construction Contractors*, 12 HARV. C.R.-C.L. L. REV. 693, 701-15 (1977).

minimum 10% MBE provision is compared with other MBE assistance programs, not only is the inflexibility of the challenged legislation exposed as unique, but evidence clearly emerges that other, less intrusive means of achieving equal procurement opportunity in federal assistance programs do exist.

II. IN ENACTING THE MINIMUM 10% MBE SET-ASIDE PROVISION, CONGRESS FAILED TO DETERMINE ADEQUATELY WHETHER LESS INTRUSIVE MEANS EXISTED TO ACCOMPLISH ANY OF ITS STATED OR "PERCEIVED" OBJECTIVES.

Accepting *arguendo* the notion that Congressional intent to remedy past acts of discrimination could be gleaned from the scarce and, where it exists, vague legislative history available, the constitutional question still remains whether Congress has chosen the least discriminatory means of accomplishing its objective. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Dunn* v. *Blumstein*, 405 U.S. 330, 342-43 (1972). Without engaging in this inquiry formally, the Second Circuit determined that judicial approval of the Labor Department's affirmative action "Home Town" plans legitimized the racial preference program here, and that because the MBE provision had such a relatively small (.25%) impact upon total annual construction expenditures in the United States, the MBE provision satisfied the equitable limitations placed upon the imposition of racial quotas by the Second Circuit previously. 584 F.2d at 600, 607-608. In both respects, however, the *Amicus* submits that the authorities cited are inapposite to the circumstances presented here.

The "Home Town" plans, as they were approved in cases such as *Associated General Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), and *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 954 (1971), were expressly addressed to remedying proven egregious and long-standing exclusion of minorities by various construction unions. Thus, in his opinion in *Bakke*, *supra*, Justice Powell cited the "Home Town" cases with approval as good examples of an "administrative body charged with the responsibility of mak[ing] determinations of past discrimination by the industries affected, and fashion[ing] remedies deemed appropriate to rectify the discrimination." 438 U.S. at 301. These cases were disapproved by Justice Powell as precedent for the University of California to implement racial and ethnic "set-asides" in its medical school class based only on statistical disparities in minority representation and without a finding of past discrimination. Similar to *Bakke*, *supra*, the record here lacks specific findings of prior discriminatory acts in the granting and awarding of contracts.

Nor do other Second Circuit decisions cited by the Court below as upholding quotas in the equal employment opportunity area support its conclusion here. In fact, in those cases the Second Circuit has shown strong reluctance to impose preferential treatment for minorities. In *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), that court approved temporary racial hiring quotas for the city's police department, but disapproved promotion quotas because

"[t]he impact of the quota upon [incumbent whites] would be harsh and can only exacerbate rather than diminish racial tensions." Moreover, the hiring quota was approved "somewhat gingerly" even though the city had persisted in using an archaic employment test, failed to seek minority recruits, and the quota was well below the minority population of the city and, presumably, did not suggest the concept of parity hiring. The court, indeed, found that "the most crucial consideration . . . is that this is *not a private employer* and *not simply an exercise in providing minorities with equal opportunity employment.*" 482 F.2d at 1341 (Emphasis added.)

In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), the court criticized racial quotas as "repugnant to the basic concepts of a democratic society" and observed that the Second Circuit had approved quotas only where there was a clear-cut pattern of long-continued and egregious racial discrimination and the absence of a showing of "identifiable reverse discrimination." 520 F.2d at 427. The *Bridgeport Guardians* distinction between hiring quotas and promotion quotas was echoed in *Kirkland*, and repeated in *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

Finally, in *EEOC* v. *Local 638*, 532 F.2d 821 (2d Cir. 1976), the court interpreted its own *Kirkland* decision as having promulgated *two-fold requirements* for the imposition of temporary quotas of all

kinds: *a clear cut pattern of long-continued and egregious racial discrimination, and the dispersal of the effects of "reverse discrimination" among a group of non-minority persons who are not "identifiable."*

Considering its previously enunciated policies, one would anticipate that the Second Circuit in this case would have vigorously explored whether Congress did not have less intrusive means than a rigid racial preference program to achieve its objective. Had it done so, it would have reached the same conclusion as the district court in *AGC of California* v. *Secretary of Commerce, supra*, that alternative means did exist:

> "In this case . . . this Court has previously found, and continues to believe that means of promoting employment of minority group contractors less intrusive than the 10% racial quota enacted by Congress existed. As pointed out in the Court's original decision, the MBE provision does not limit itself to businesses which have previously experienced a prescribed level of income or unemployment. In addition, Congress has never demonstrated that affirmative action plans in this industry are not feasible. Furthermore, the 2-15% MBE provision in the most recent bills introduced in Congress, while still maintaining a quota system, may indeed be less intrusive than the original strict 10% quota system." 459 F. Supp. at 780-81.

There is more than mere speculation involved in the California district court's findings. In fact, the government has undertaken a program to encourage the development of minority business enterprises

without using rigid quotas. Under Executive Order No. 11458, 34 Fed. Reg. 4937 (1969), as amended by Executive Order No. 11625, 36 Fed. Reg. 19962 (1971), there was established within the Department of Commerce the Office of Minority Business Enterprises (OMBE). Under this order, OMBE is authorized to provide financial assistance to public and private organizations that render management and technical assistance to MBEs. Significant OMBE programs have included Business Development Organizations (BDOs); Minority Business and Trade Associations (MB & TAs); Business Resource Centers (BRCs); Private Resource Programs (PRPs); Contracted Support Services (CSSs); and State Offices of Minority Business Enterprise (State MBEs). OMBE also participates in other activities supporting minority enterprises, including the Interagency Council for Minority Business Enterprise and the MESBIC program (Minority Enterprise Small Business Investment Companies).

Moreover, even where Congress has sought to promote MBE opportunities in direct federal procurement with the use of goals, it has not required a specific percentage of MBE participation, but instead has explicitly chosen *flexible* programs. For example, Congress recently enacted a law, Pub. L. No. 95-507, 92 Stat. 1757 (1978) (the "Act"), which, in effect, mandates affirmative action in government procurement. Part of the new legislation amends Section 8(d) of the Small Business Act to require, generally, that the apparent successful or apparent low bidder on large federal contracts [18] submit, before award of

[18] The threshold figures stated in the Act are $1,000,000 for contracts for construction of any public facility and $500,000 for all other contracts.

contract, a subcontracting plan setting forth "percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned or controlled by *socially or economically disadvantaged individuals*." (Emphasis added.) The Act, § 211. The prime contractor also must describe the efforts it will take to assure that such companies have an "equitable opportunity" to compete for subcontracts. *Id.* In avoiding a rigid percentage requirement, the Act plainly contemplates the development of flexible goals.

The California district court's reference to a flexible 2-15% minority set-aside and 10% nationwide target, proposed in a Round III to the Public Works Act, raises yet another, less intrusive alternative. Although the proposed legislation was not enacted, see Daily Labor Report No. 204, at A-4 (BNA Oct. 20, 1978), it was found sufficiently attractive by the Comptroller General to win his endorsement as a program *preferable* to the minimum 10% MBE set-aside in the 1977 Act. After criticizing several aspects of the 1977 Act's administration, the Comptroller General concluded that:

> ". . . a minority provision or policy should be designed so that the social and economic benefits can be increased and at the same time, many of the problems discussed in this report can be reduced or eliminated. To meet a goal of 10 percent participation, flexible percentages should be established based on the availability of minority firms. The legitimacy of minority firms should be certified before receiving contracts as part of meeting a minority requirement. Only a supplier's commission or markup on sales should be counted toward the minority goal. Exceptions

could be made for suppliers who manufacture their product such as a concrete pipemaker. Also, Federal funds should be released gradually so that assistance provided to minority firms is extended over a longer period to better prepare such firms to become competitive within the construction industry." "Minority Firms on Local Public Works Projects—Mixed Results," *supra*, at 41.

In his recommendation to Congress, the Comptroller General urged that minority provisions "use a flexible percentage for applying the minority requirement based on the availability of minority firms and/or percentage of minority population in certain areas measured against an overall goal." *Id.*, at 42.

In sum, alternatives to a minimum 10% MBE setaside do exist, and regardless of their own legal merits, either on their face or as applied, those reviewed above contain various degrees of flexibility and thus perforce represent less objectionable methods to increased utilization of MBEs than the rigidly-fashioned legislation here reviewed.

It should be noted, at this point, that this brief has discussed less restrictive alternatives to the minimum MBE amendment in more depth than either that which can be found in the relevant legislative debates, or that which can be found in the opinion of the court below. Yet, it is not the petitioner who has the burden of showing that a less restrictive alternative exists. On the contrary, it is the government which must prove that there are no less restrictive means. See *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1122 (1969).[19]

Moreover, although this Court has declared that "the Constitution does not require the state to choose ineffectual means to achieve its aims," *Stores* v. *Brown*, 415 U.S. 724, 736 (1974), it has not made "equal effectiveness" the standard by which presumptively invalid classifications may be upheld. Thus, for example, in *Carrington* v. *Rash*, 380 U.S. 89 (1965), this Court invalidated the denial of the right to vote enjoyed by armed forces personnel who moved to the state, on the basis that more precise tests were available to determine bona fide residency. However, "[i]t is obvious," as one commentator noted, "that *some* additional administrative costs would be incurred by replacing the presumption with the more precise tests." (emphasis in original) Note, *A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 876 n.379 (1978). *See also Vlandis* v. *Kline*, 412 U.S. 441 (1973) (statutory irrebuttable presumption that certain applicants for in-state tuition at a university were nonresidents found constitutionally infirm, because a more refined test of residence was practicable). Consequently, the vague expression of a member of Congress that a previous, unrelated MBE

[19] The *Amicus* acknowledges that "a party cannot reasonably be asked to anticipate and refute every possible challenge to its position." Note, *A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 881 (1978). But even "if the government is asked only to disprove plausible alternatives proffered by the plaintiff or the court, burden of proof will have been reasonably allocated in cases where an important personal interest is significantly infringed or where the classification is almost prima facie unfair." *Id.*

assistance program had not achieved sufficiently high MBE participation in federal procurement (see statements of Rep. Mitchell, summarized *supra*) hardly illustrates a legislative review of plausible alternatives and, in any event, does not justify resort to a set-aside procedure that, as illustrated by the review of equal employment opportunity case law, constitutes such an extreme form of relief.

III. PRINCIPLES ESTABLISHED UNDER EEO LAW SUPPORT THE CONCLUSION THAT THE IMPOSITION OF SET-ASIDES MAY BE INVOKED ONLY AS A LAST RESORT, AND THAT WITHOUT ANY FINDINGS OF PAST ACTS OF DISCRIMINATION, THEY MUST NOT BE INVOKED AT ALL.

As this Court has indicated on a number of occasions, where equitable considerations are involved, "the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); and *The Regents of the University of California* v. *Bakke*, 438 U.S. at 300-01 (1978). This limitation is most apparent in the manner in which the courts have addressed quota remedies in the EEO area. The opinion below merely pays lip service to these equitable limitations upon racial preferences, with the consequence that its uncritical analysis leads to a result plainly at odds with the overwhelming weight of judicial precedent.

The general approach of most courts to the imposition of quotas under Title VII has been one of circumspection bordering on hostility. The Fourth Circuit, for example, has indicated that ". . . § 703

(j) [of Title VII] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance." *Lewis* v. *Tobacco Workers*, 577 F.2d 1135, 1141 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3455 (U.S. Jan. 9, 1979).[20]

As indicated in Part II of this brief, *supra*, until the Second Circuit issued its opinion below, it had established a long precedent for approaching quotas similarly with a jaundiced eye. Other circuit courts also have declared unequivocally that quota relief should be reserved for particularly egregious discriminatory practices that have been properly established on the record. *See, e.g., Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977) ("Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm"); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977) ("[T]he necessity for preferential treatment should be carefully scrutinized and . . . such relief should be

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[20] *Cf., Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978). *See also, Crockett* v. *Green*, 388 F. Supp. 912, 921 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976) "[R]atio hiring or quota relief is an unusual and extraordinary remedy and does not automatically follow from the finding of any kind of discrimination . . . [It] is appropriate . . . [where] . . . it appears to be the *only* possible means to provide relief for racial discrimination." (Emphasis added.); *Dawson* v. *Pastrick, supra*, 19 EPD at 760 (preferential relief is an "extraordinary" remedy "of last resort".).

required only when there is compelling need for it."); *NAACP* v. *Allen*, 493 F.2d 614, 621 (5th Cir. 1974) (The quota "is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee that they would fail.") These decisions, among others, establish that EEO-related statutes provide no basis for fashioning a remedy based upon background underrepresentation statistics not directly related to past acts of discrimination. *See, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 ("Title VII imposes no requirement that a workforce mirror the general population"); *cf. Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974) (§ 1981).

In addition, as we indicated previously during discussion of the "Home Town" Plan cases (*see, e.g. Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra*), there is no basis for assuming that the Constitution, as opposed to EEO statutory law, looks any more favorably upon such an extreme remedy invoked without at least the correction of specific discriminatory acts as the explicit objective. Those cases, it will be recalled, involved constitutional and other challenges to the implementation of Presidential Executive Order No. 11246 (30 Fed. Reg. 12319 (1965)), as amended by Executive Order No. 11375 (32 Fed. Reg. 14302 (1967)), and 43 Fed. Reg. 46501 (1978) (E.O. 11246), which requires that all nonexempt government contracts and subcontracts include an equal opportunity clause pursuant to which the contractor or subcontractor undertakes not to discriminate on the basis of race, color, religion, sex or national origin

and also to take affirmative action to ensure that applicants and employees are treated "without regard" to those factors (Sec. 202(1)). Although the courts in those cases approved minority group employment goals under E.O. 11246[21] where underutilization had been shown, they did so expressly in cases with proven egregious and long-standing exclusion of minorities by various construction unions. See 442 F.2d 159, 163, 173. The "Home Town" Plan cases thus indicate that statistical imbalances, standing alone, are an insufficient basis by which Government can legitimately indulge in racial classifications.

One factor that distinguishes the "Home Town" Plan cases from this case, of course, is that they concerned the constitutionality of an executive order, whereas this case concerns the lawfullness of a statute. However, this distinction only makes the limitation upon this particular racially based set-aside

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[21] Under regulations promulgated pursuant to E.O. 11246, federal contractors are required to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments. If a contractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the underutilization in any particular job group. Revised Order No. 4, 43 Fed. Reg. 49249, *et seq.*, Part 60-2. Although Government officials have stated that, unlike Title VII, the statistical imbalances that trigger these affirmative action requirements need not be connected to any showing of past or present discrimination (*see, e.g. Hearings on S. 2115, etc., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92nd Cong. 1st Sess. 77, 78 (1971); Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U. L. REV. 225, 229-30 (1971)), the legality of this proposition has never been definitively established.

program more evident. By addressing on its merits the equal protection challenge in a case such as *Contractors Association of Eastern Pennsylvania* v. *Secretary of Commerce*, 442 F.2d at 176-77, the Third Circuit was indicating that the implementation of racial preferential programs via an executive order is subject to the constitutional limitations upon government action. If an executive order is subject to such limitations, a statute would not enjoy a lesser restriction, particularly where both the executive order and the MBE statute relate to racial preferences in the context of federal assistance programs.

Accordingly, unless the minimum MBE participation plan here was undertaken *voluntarily* between private parties, *United Steelworkers of America* v. *Brian F. Weber, et al.*, 47 U.S.L.W. 4851 (U.S. June 27, 1979), there is no basis for finding, as the Second Circuit did, that EEO-related law provides support for approving government compelled racially-based set-asides that are unaccompanied by findings of past acts of discrimination. And since the minimum 10% MBE set-aside reviewed here is a legislative scheme, it is, of course, the antithesis of the voluntary preferential plan described by the *Weber* majority.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Second Circuit should be reversed with instructions that the order of the district court be vacated and that petitioners be granted appropriate relief.

Respectfully submitted,

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H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,
Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,
Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS H. EARL FULLILOVE, ET AL.

INTEREST OF AMICUS

This brief amicus curiae is respectfully submitted on behalf of amicus curiae Pacific Legal Foundation (hereinafter PLF) pursuant to Supreme Court Rule 42. Consent

to the filing of this brief has been granted by counsel for all parties and has been filed with the Clerk.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

At the present time, PLF counsel are representing plaintiffs and appellees Associated General Contractors of California, *et al.*, in several actions before this Court, Nos. 78-1108, 78-1114, 78-1382, 78-1107, 78-1442, which, like the present case, challenge the validity of the minority business enterprise quota of the Public Works Employment Act of 1977. This Court has, as of now, taken no action in the above designated cases. PLF, therefore, wishes to take this opportunity to present its views in regard to the quota provisions and to argue that, as applied to this case, the guarantees of the United States Constitution prohibit such preferences.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 443 F. Supp. 253 (S.D.N.Y. 1977), and the opinion of the United States Court of Appeals, Second Circuit, is reported at 584 F.2d 600 (2d Cir. 1978).

STATEMENT OF THE CASE

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977 (hereinafter Act or PWEA), Pub. L. No. 95-28, amending the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§ 6701, *et seq.* The amendments, among other things, included a provision which required that at least 10% of the dollar value of each project grant be expended with certain minority business enterprises. On May 27, 1977, the Secretary of Commerce issued regulations implementing minority business enterprise (hereinafter MBE) preference. These regulations restated the statutory requirement that no grant would be made under the Act unless at least 10% of the grant amount is expended with minority business enterprises. 42 Fed. Reg. 27,434-35 (May 27, 1977).

Numerous challenges were made in United States district courts to the constitutional and statutory permissibility of the MBE provision of PWEA. Three district courts found the MBE to be unconstitutional, either on its face or as applied. *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977); *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977); *Montana Contractors' Association v. Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1978). In the present case, both the United States District Court for the Southern District of New York and the United States Court of Appeals, Second Circuit, found the provision to be valid. *Fullilove v. Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977); *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978). This Court must now determine whether these rulings were proper. It is the position of amicus curiae Pacific

Legal Foundation that, in upholding the MBE preference, the courts below failed to apply properly the standards required by this Court for cases in which governmental activity is challenged for failure to comply with the equal protection and due process guarantees of the United States Constitution. It is further the position of amicus curiae that the courts below erred in not finding the MBE preference in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000, *et seq.*

ARGUMENT

I

THE MBE PREFERENCE IN THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), requires that:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The primary issue in this case is whether this Act violates the equal protection, due process, and other guarantees of the United States Constitution. The issue of the constitutionality of a federal statute which grants a preference to selected minority groups is clearly one that this Court has never before reached. However, as with many questions of first impression, the Court is not, in this case, without an excellent map established by the principles of prior decisions, which plainly set forth the route to the final decision.

It is established that the Fourteenth Amendment guarantees of equal protection apply, by way of the Fifth Amendment's Due Process Clause, in cases of federal action. *Washington v. Davis*, 426 U.S. 229, 239 (1976). It is also clear that classifications, such as the one at issue in the present case, which are based on race or national origin, are inherently suspect and subject to the most strict scrutiny under an equal protection analysis. *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967). The fact that a state action discriminates against persons not traditionally termed "minorities" does not alter the scrutiny required when a court examines classifications based on race or national origin. *Civil Rights Cases*, 109 U.S. 3, 24 (1883); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896, 4904 (1978) (opinion of Powell, J.).

Further, it is settled that when a law establishes a classification which is subject to strict scrutiny, the government imposing the classification must show the law is "'necessary to promote a compelling governmental inter-

est.'" *Dunn v. Blumstein,* 405 U.S. 330, 342 (1972). As this Court made explicit in *Dunn v. Blumstein,* 405 U.S. at 343:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' [citations omitted], and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, at 631, 22 L Ed 2d at 613. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

These established principles, when applied to the facts of this case, demonstrate that MBE quotas in PWEA unconstitutionally abridge the rights guaranteed to the petitioners by the United States Constitution.

A. The MBE Preference Has Not Been Shown to Serve a Compelling State Interest

At the heart of the decision upholding the Act's MBE quota is the finding that "under the most exacting standard of [equal protection] review the MBE provision passes constitutional muster." *Fullilove,* 584 F.2d at 603. In making this determination, the court correctly recognized that it must inquire into whether the MBE provision served a compelling state interest and noted that the provision "is permissible only if it is a remedy for past discrimination." *Id.*

In holding that a remedial preference can fulfill a compelling state need, the Court of Appeals specifically endorsed and relied upon the reasoning of Justice Powell in *Bakke.* The issue in *Bakke,* concerning the permissibility of a 16% set-aside for minority medical school applicants, is strikingly similar to the issue presented in this case. In *Bakke,* Justice Powell's opinion constituted the determinative factor in holding the set-aside invalid. While Justice Powell did consider that the remedying of past discrimination might serve as a compelling justification for a minority preference, he elaborated:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. [Citations omitted.] After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations [footnote omitted], it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. [Footnote omitted.]" *Bakke,* 46 U.S.L.W. at 4906-07.

Thus, in order for the MBE quota in PWEA to be justified as meeting a compelling state need, the quota must be shown to be based on specific findings of past discrimination against MBE's preferred by the Act. While the Court of Appeals appears to recognize this requirement, its analysis of the congressional action preceding the adoption of the quota and its determination that "Congress acted upon sufficient evidence of past discrimination," *Fullilove,* 584 F.2d at 606, reveals a misunderstanding of the issues involved.

Briefly, the Court of Appeals found that in adopting the MBE provision of PWEA, Congress, because of its special competence, must be presumed to have intended to remedy past discrimination and that the quota would "[make] no sense unless it is construed as a set-aside to benefit minority contractors." *Id.* at 604 (footnote omitted). It also held that although there were no explicit congressional findings of past discrimination, this could be overlooked because knowledge of the history of discrimination in the construction industry was well established in the minds of the members of Congress. In addition, the court construed as findings a one sentence comment referring to economic and social discrimination in the national business system contained in a report prepared by a subcommittee on a matter unrelated to the MBE provision. *Id.* at 605-06, n.10.

The errors of the Court of Appeals' determinations become clear when the evidence of congressional activity surrounding the passage of the MBE preference is carefully examined and when the pertinent law is applied to this evidence. To begin, the issue here is not really the authority of Congress to provide a remedy for past discrimination under the provisions of the Thirteenth and Fourteenth Amendments. Quite clearly, there is congressional authority for that purpose. *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Jones v. Alfred H. Mayer Company,* 392 U.S. 409 (1968). However, this authority is limited by the fact that Congress, like all other governmental agencies, is prohibited from denying persons the constitutional guarantees of due process and equal protection. *Katzenbach v. Morgan,* 384 U.S. at 650. In cases involving minority preferences, these guarantees are protected by requiring legislative findings of discrimination against minorities before a preference is allowed. *Bakke,* 46 U.S.L.W. at 4906-07; *Wright Farms Construction, Inc. v. Kreps,* 444 F. Supp. at 1038-39.

To recognize, as Justice Powell has done in *Bakke,* 46 U.S.L.W. at 4905 n.41, that Congress has special competence "to make findings with respect to identified past discrimination and its discretionary authority to take appropriate remedial measures" is indeed appropriate. However, it is a quantum leap from here to assuming, as the Court of Appeals did in this case, that Congress must be presumed to have made findings. There is a total absence of any congressional findings of identified past discrimination or constitutional or statutory violations against MBE's assisted by the preference in PWEA. The legislative history of the preference, which is confined to several pages in the congressional record, is devoid of any references to past discrimination. The most that can be said here is that proponents of the measure felt that minority businesses were underrepresented among those companies receiving federal contracts. 123 Cong. Rec. H1436-37 (1977)

(Remarks of Rep. Mitchell[1]). This notation of underrepresentation quite clearly cannot support a finding of discrimination. *Washington v. Davis,* 426 U.S. 229 (1976).

Similarly, there is nothing in the congressional history of the preference in general, nor specifically in the statements of its proponents, which would indicate an intent to remedy generalized past discrimination, even though specific findings had not been made. The goal to which the proponents refer is only that minorities be given some hypothetical "fair share" of government contracts. 123 Cong. Rec. H1440 (1977) (Remarks of Rep. Biaggi). Proportional parity is not required by the Constitution. Indeed, without more it is prohibited. *Washington v. Davis, supra.*

Also, it is apparent that the section of the report of the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise (hereinafter Subcommittee Report) relied upon by the Court of Appeals cannot be considered to be the type of findings required by Justice Powell in *Bakke* to support a minority preference. The quoted section contains no reference to the "identified past discrimination" mentioned by Justice Powell. The section merely notes past social and economic discrimination in the "business system" and observes that, "minorities, until recently, have not participated to any measurable extent, in our total business system generally,

[1]In *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 969 (C.D. Cal. 1977), the court questioned whether these statements could be considered legislative history. Rather, the court characterized the statements as merely "debate rhetoric of a partisan." *See also, Montana Contractors' Association v. Secretary of Commerce,* 460 F. Supp. 1174, 1178-79 n.6.

or in the construction industry, in particular." *Fullilove,* 584 F.2d at 606 (emphasis omitted). There is absolutely no evidence that the report was considered by Congress during passage of PWEA's MBE provision or that the 10% quota was in any manner intended to remedy this past discrimination. *Montana Contractors' Association v. Secretary of Commerce,* 460 F. Supp. 1174, 1178-79 n.6 (D. Mont. 1978). Therefore, the "record" of MBE preference in PWEA is totally devoid of findings of statutory or constitutional violations against minority controlled construction businesses.

This absence is crucial inasmuch as Justice Powell has stressed,

> "Before relying upon these sort of findings [of discrimination] in establishing a racial classification, a governmental body must have the authority and capability to establish, *in the record,* that the classification is responsive to identified discrimination." *Bakke,* 46 U.S.L.W. at 4907 (emphasis added).

In the present case, the lack of specific findings of prior discrimination destroys any "capability to establish, in the record," that the MBE program was responsive to this problem.

It is also emphasized in Justice Powell's opinion in *Bakke* that in order to validate a minority preference, findings of statutory and constitutional violations constituting discrimination must be made *prior* to the preference's formulation and implementation. It is also clear that *post hoc* justifications, precipitated by a legal challenge, will not uphold a preference. *Bakke,* 46 U.S.L.W. at 4908 n.44; *Department of General Services v. Superior Court,* 85 Cal.

App. 3d 273, 284 (1978). In the instant case, all that exists are attempts at *post hoc* justifications of MBE preference.[2]

Furthermore, it is clear from the evidence to which the trial court refers that even the *post hoc* justifications of MBE preference presented there cannot support its validity. First, the Subcommittee Report speaks only in terms of generalizations. *Fullilove v. Kreps,* 443 F. Supp. at 295. More importantly, however, the only witness for the government at trial did not indicate any prior discrimination, but rather lack of it. Specifically, this witness "conceded on cross examination that he knew of no concerted effort by construction contractors to discriminate against minority business enterprises in the City of New York." *Fullilove v. Kreps,* 443 F. Supp. at 260 n.16. Thus, lacking a basis in specific findings of past discrimination, the MBE preference in PWEA cannot pass constitutional muster as fulfilling a compelling state interest.

B. The MBE Quota Has Not Been Shown to Be Necessary Nor Has It Been Shown to Be the Least Intrusive Method of Serving This Interest

Amicus has argued that a compelling state interest cannot be served by the MBE quota at issue here because it

[2]As related in the text, the legislative history of the MBE preference indicates only a statement, on the part of the preference proponents, of minority underrepresentation in business and a desire to give minorities a hypothetical "fair share" of federal contracts. 123 Cong. Rec. H1440 (1977) (Remarks of Rep. Biaggi). There is no evidence of findings of discrimination made by Congress prior to enacting the preference. The only "specific" reference on which the Court of Appeals relies is the Subcommittee Report on small and minority businesses (*Fullilove v. Kreps,* 584 F.2d 600, 606 (2d Cir. 1978)). Since there is no record of this being before Congress at the time of consideration of the MBE preference, it was apparently not unearthed until respondents attempted to justify the quota at trial.

is not a remedy for past discrimination based upon specific findings of constitutional or statutory violations consisting of discrimination against minority businesses. Even assuming *arguendo* that there had been some generalized discrimination and knowledge of this on the part of Congress, these factors could not, in this case, be applied to support the validity of the MBE quota. Governmental action subject to strict scrutiny cannot be upheld solely on the basis that it meets a compelling state need; it must also be shown to be strictly "tailored" to serve legitimate objectives. Further, the government in serving the compelling state interest must choose means which are the least restrictive of constitutional rights. *Dunn v. Blumstein,* 405 U.S. at 343. In the context of the present case:

> "[i]f previous discrimination is one of the factors justifying a selection, [of a group for minority preference] then, generally speaking, the inclusion of members in the group who have not been victims of discrimination would not serve the public interest. By the same token, if to remedy the damage done or to promote racial equality a law is enacted which includes individuals upon whom those factors have not operated, then the remedy has not been precisely tailored." *Montana Contractors' Association v. Secretary of Commerce,* 460 F. Supp. at 1177.

The MBE quota here at issue makes no provision for aiding only minority group members who were victims of prior discrimination. Further, it even fails to make provision for implementation in areas where alleged discrimination has taken place or to make provision for utilization with respect to contractors who have practiced discrimina-

tion.[3] It therefore cannot be viewed in any way to be strictly tailored to meet the legitimate remedial objective. *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. at 965.

In actuality, it might even be doubted whether the MBE preference in PWEA could be said to be tailored in any way so that a remedial objective could be carried out. Since the preference contained no criteria of previous discrimination, there was no requirement that minority firms approved to fulfill the quota be victims of discrimination. As practice has shown, the lack of this requirement has indeed served to benefit many who could not be considered discriminatees under any definition of the term. General Accounting Office, *Report to the Congress of the United States: Minority Firms On Local Public Works Projects—Mixed Results,* January 16, 1979, at 25-30 (hereinafter GAO Report).

Just as respondents could not show that the MBE quota in PWEA is strictly tailored to meet a remedial objective, neither could they show that there are no other reasonable ways to achieve remedial goals which might be less restrictive of petitioners' constitutional rights.

Imposing a racial preference in the form of a quota is a most drastic measure. *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir. 1975). Thus it would have to be very clear that there were

[3] If Congress had been attuned to aiding specific victims of actual discrimination in passing the MBE preference in PWEA it is quite unlikely that the preference would have operated to affect current petitioners. This is the case because, even when given the opportunity to justify the MBE preference after the fact, respondents could produce no evidence of discriminatory activity by petitioners. *Fullilove v. Kreps,* 443 F. Supp. 253, 260 n.16 (S.D.N.Y. 1977).

no reasonable alternatives available in the present case in order to justify the quota's use. This clarity simply does not exist. On the contrary, it is apparent that alternative means for aiding minority businesses, even assuming past discrimination, were readily available to the government. The means which most readily come to mind are, of course, utilization and improvement of the Small Business Administration program authorized under 15 U.S.C. §§ 631, *et seq.* The GAO Report makes clear that these means could have indeed been utilized more effectively, even in conjunction with the MBE program. GAO Report at 30-32. *See also, Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. at 965-66.

It is also apparent that Congress itself was aware of means less intrusive than the strict 10% quota upheld by the Court of Appeals. During the second session of the 95th Congress, detailed consideration was given to institution of an MBE preference which, although stated in terms of a quota, would not be absolute in regard to percentage and would be geared to MBE availability. *Associated Contractors of California v. Secretary of Commerce,* 459 F. Supp. 766, 775 (C.D. Cal. 1978). Although such a sliding quota, without more, might be subject to attack on equal protection grounds were it not remedial and based on findings of discrimination, the fact that it is available indicates that a nationwide 10% preference is unreasonably burdensome.

In upholding the constitutionality of PWEA's MBE quota the Court of Appeals appears to give consideration to the requirement that governmental action subject to strict scrutiny must not only fulfill a compelling state interest, but must also meet additional tests. However, in

place of the requirements that such action must be strictly tailored to fulfill legitimate objectives and minimally intrude into the constitutional rights of affected parties, the Court of Appeals determined only that the action must "not exceed the bounds of fundamental fairness." *Fullilove,* 584 F.2d at 607. This determination is completely at odds with the equal protection standards set forth by this Court in *Dunn v. Blumstein, supra.*

Further, it is difficult to transfer and utilize the fundamental fairness concept to which Justice Powell referred in *Franks v. Bowman Transportation Company,* 424 U.S. 747 (1976), to the quota at issue in the present case in that *Franks,* as a Title VII case, did not even consider equal protection standards as applied to state action.

Therefore, if the well established equal protection standards elucidated in *Dunn v. Blumstein, supra,* are to be altered, this alteration cannot be made based upon reasoning in a case which does not even consider such standards. Thus, the Court of Appeals erred when it engrafted fundamental fairness concepts onto a strict equal protection analysis.

The Court of Appeals commits further error when it attempts to minimize the effects of the MBE quota upon nonminority businesses. The court reasons:

> "Considering that nonminority businesses have benefitted in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competition for this relatively small amount of business for the short time that the program has to run." *Fullilove,* 584 F.2d at 608.[4]

[4]Under the MBE preference in PWEA, nonminority businesses have been excluded from $400 million worth of contracts.

This reasoning primarily ignores the fact that the equal protection guarantees of the Constitution apply to individuals not groups, *Shelley v. Kraemer,* 334 U.S. 1, 22 (1947). Thus, even were generalized discrimination to be assumed here, this cannot justify the adverse effects of preferential relief upon those who have not discriminated. This is in itself inequitable and indeed impermissible when the preferential relief is not, as it is not in the present case, directed toward aiding specific victims of discrimination. *Bakke,* 46 U.S.L.W. at 4904, 4906. Further, the assumption that petitioners, or any specific nonminority business, have benefited from, or achieved their current positions, as a result of minority discrimination, thus reducing the inequity of the MBE quota, is an unwarranted assumption which simply cannot be made. *Id.* at 4903 n.36.

II

THE MBE QUOTA IS AN UNCONSTITUTIONAL BILL OF ATTAINDER

The MBE quota raises serious questions under article I, section 9 of the United States Constitution which prohibits the enactment of bills of attainder.[5] The constitutional prohibition against bills of attainder has been examined by this Court infrequently. However, in 1866 the Court examined a portion of the Missouri Constitution which required persons to take an oath of loyalty as a prerequisite to practicing a profession or holding a position of "honor, trust or profit" in the state. *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 317 (1867). In finding that

[5]Article I, Section 9, Clause 3 of the U.S. Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed".

the oath requirements constituted a prohibited bill of attainder, this Court in *Cummings* reviewed the historical and philosophical derivations of bills of attainder. In so doing, the Court set forth standards, defining a bill of attainder as "a legislative act, which inflicts punishment without a judicial trial." *Id.* at 323. Punishment was broadly defined by the Court in the following manner:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determine this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as executor, administrator or guardian, may also, and often has been, imposed as punishment." *Id.* at 320-21.

The evil of this type of deprivation through legislative action was clear. As the Court indicated:

> "there would be legislative enactment creating the deprivation, without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." *Id.* at 324.

In addition to the element of punishment, the Court in *Cummings* established that to be prohibited as a bill of attainder, a legislative enactment must also be specific. In other words, it must single out or designate named individuals or ascertainable groups to bear the penalty of the law.

The MBE provisions of PWEA contain both the elements, punishment and specificity, of bills of attainder.

It is a legislative enactment which applies to members of an ascertainable group, nonminority contractors who wish to work on specific federally funded projects. Under the MBE provisions, general contractors are, without more, prevented from successfully bidding for government work unless they work with certain designated groups. Nonminority subcontractors are totally excluded from at least 10% of all the federal contracts awarded under the Act. This type of requirement is akin to that held invalid in *Cummings* wherein the provision challenged deprived certain persons of their chosen livelihoods.

It is also similar and perhaps more closely related to the federal statute which this Court examined in *United States v. Lovett,* 328 U.S. 303 (1946). That statute specifically prevented certain individuals from holding government employment by prohibiting appropriations for their salaries. This Court had little difficulty in finding the legislation prohibited by the bill of attainder clause and stressed its severity in excluding individuals from their chosen employment. *Id.* at 316. While the exclusionary features of the PWEA minority quota are not as severe as those in either *Cummings* or *Lovett,* the amount of exclusion or punishment is immaterial in determining whether legislation is proscribed as a bill of attainder. *United States v. Lovett,* 328 U.S. at 324 (Frankfurter, J., concurring).

In meeting the definitional elements required for bills of attainder, the MBE quota forcefully illustrates the evils toward which the bill of attainder clause was directed. This Court in *Cummings* indicated the dangers of deprivation of rights without the safeguards traditionally associated with

the judicial process. The Court in *Lovett* elaborated upon this in holding that the framers of the Constitution:

> "intended to safeguard the people of this country from punishment without trial by duly constituted courts. [Citations omitted.] And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. . . . When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder." *Id.* at 317-18.

In the instant case, the nonminority individuals subject to the MBE quota have had not even the benefit of a legislative trial. Since there have been no findings of specific past misconduct in the form of discrimination against minorities and no attempt even made to make such findings, the excluded contractors have had no opportunity to show either that there has been no misconduct at all or that they themselves have not participated in it. They are simply being asked to submit to the penalty of exclusion. It is this mute submission that the bill of attainder clause was created to prohibit.

In *United States v. Brown*, 381 U.S. 437 (1965), this Court again dealt with a challenge that a certain federal enactment violated the constitutional prohibition against bills of attainder. In ruling that the statute was invalid, the Court, as it had done in the past, examined the philosophies of the men who created the United States Constitution. In quoting from the writings of Alexander Hamilton, the Court illuminated yet another danger of allowing the

Legislature to penalize certain individuals without providing adequate safeguards:

> "'Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.'" *Id.* at 444 (footnote omitted).

A minority quota such as that included in PWEA aptly illustrates the exclusionary dangers which Alexander Hamilton feared. In fact, writing almost 200 years after Hamilton, Justice Douglas, dissenting in *De Funis v. Odegaard*, 416 U.S. 312, 341-43 (1974), alluded to many of the same reservations when discussing a minority quota for law school admissions. Justice Douglas noted that quotas for one group can evolve into quotas for all and that preferential policies may well carry stigmatization as severe as active discrimination. These dangers cogently illustrate that while quotas may indeed "gratify momentary passions" of political expediency, they may well establish "principles and precedents which afterwards prove fatal to themselves."

III

THE MBE PROGRAM IN THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 IS IN VIOLATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The appellate decision in *Fullilove* dealt almost exclusively with the court's views regarding the constitutional permissibility of PWEA's MBE provisions. However, it is also apparent that the court considered the preference to be consistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d), *et seq.*[a] *Fullilove*, 584 F.2d at 608 n.15. In *Bakke*, Justices Stevens, Stewart, Rehnquist, and the Chief Justice would have decided the case solely on the basis of Title VI, stating that the statute must have a "colorblind" application which prevents the exclusion of any person from a federally funded program on the ground of race.

In concluding that Title VI would have invalidated the University of California at Davis' medical school admissions policy, the justices reiterated:

> "[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Bakke*, 46 U.S.L.W. at 4935.

In the present case, as in *Bakke*, it is apparent that an alloted percentage of governmentally created benefits was denied to nonminorities simply because of their race. This

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[a]Title VI of the Civil Rights Act of 1964 provides:

> "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

similarity clearly indicates that the reasoning of Justices Stewart, Rehnquist, Stevens, and the Chief Justice that Title VI mandates a color-blind approach would find the MBE quota in PWEA to be in violation of Title VI. When the opinion of Justice Powell in regard to Title VI is considered, the decision of a majority of the Court's members necessitates a finding that the MBE preference violated Title VI. Justice Powell observed:

> "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 4900.

Therefore, in Justice Powell's opinion, if a federally funded activity violates the Constitution's guarantees in regard to racial treatment, it also violates Title VI. As has been discussed in detail above, the MBE preference of PWEA clearly violates the guarantees of equal protection.

It is, therefore, apparent that the program challenged herein cannot survive a Title VI challenge when Title VI is read in the manner in which a majority of the *Bakke* court indicates it must be. And, as noted in *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. at 966-69, the circumstances surrounding the adoption of the MBE quota in PWEA subordinate that statute to the national policy expressed in Title VI.

CONCLUSION

Using the Thirteenth and Fourteenth Amendments as bases, the representatives of the American people have gradually passed legislation designed to eradicate racial distinctions. *See, e.g.,* Civil Rights Acts, 42 U.S.C. §§ 1981, *et seq.;* Civil Rights Acts of 1964, 42 U.S.C. §§ 2000(a) *et seq.* The 10% MBE quota contained in PWEA represents a radical departure from this tradition. Instead of eliminating racial considerations from governmental determinations, the quota stresses these considerations. It is the position of amicus that such a departure cannot be made consistent with the guidelines of equal protection which have evolved from the Fifth and Fourteenth Amendments. Congress has failed to resort to studied action, supported by detailed reasoning, and rather has summarily approved an arbitrary quota based solely upon assertions of several members that certain groups have been underrepresented in certain areas of the national scene. Inasmuch as the decision of the Court of Appeals in the present case approved just such an arbitrary quota, it is respectfully submitted that this Court reverse the decision below and find the MBE quota here at issue statutorily and constitutionally impermissible.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners,*

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE MINORITY CONTRACTORS ASSOCIATION, INC.

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BRIEF AMICUS CURIAE OF THE MINORITY CONTRACTORS ASSOCIATION, INC.

INTEREST OF AMICUS

This brief *amicus curiae* is submitted with the consent of counsel[1] on behalf of the Minority Contractors Association, Inc. The Minority Contractors Associa-

[1] This brief is filed with the consent of the parties. The letters of consent that are not presently on file with the Clerk will be filed with the Clerk of Court immediately following receipt.

tion, Inc., is an association of predominately Native American Construction contractors and subcontractors located in the State of Montana. The Indian membership of the Association reflects the demographic fact that Indians comprise the only significantly numbered minority group in the State of Montana. The Association, concerned with the economic well-being of its members, has a special interest in the implementation of federal statutes which may yield economic benefits to minority contractors in general and Indian contractors in particular. Federal statutes providing for Indian preference in employment are of special concern to the Association as these statutes directly affect the livelihood of Association members. *See, e.g.,* § 7(b) of the Indian Self-Determination Act, 25 U.S.C. § 450e(b); and the Buy-Indian Act, 25 U.S.C. § 47. Since the Minority Business Enterprise (MBE) provision of § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. § 6705(f)(2), expressly provides a limited employment preference for American Indians and other minorities, a decision concerning the provision's constitutionality could obviously have substantial impact upon the economic vitality of Indian owned economic enterprises as well as the validity of other Indian preference legislation. Indeed, the federal district court in Montana, applying the strict scrutiny test, held that the MBE provision is unconstitutional as applied to Indians. *Montana Contractors Association, et al.* v. *Secretary of Commerce, et al.,* 460 F.Supp. 1174 (D.Mont. 1978). The rationale of that decision threatens all Indian preference legislation and the decision itself directly affects the members of the Association. The interest of the Association as *amicus curiae* is therefore apparent.

ARGUMENT

I. With Respect To American Indians The Rational Basis Test Is The Proper Standard Of Judicial Review.

Amicus does not intend to offer additional arguments as to the constitutionality of the MBE provision of PWEA under the strict scrutiny standard of review. The Solicitor General and the other *amici* have adequately demonstrated the constitutionality of the MBE provision under the strict scrutiny test, and *amicus* joins in these arguments. *See Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978).

Amicus does point out, however, that the rational basis test has continuously been applied by this Court to test the constitutionality of federal legislation affecting Indians. The leading modern case is *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974). *See also Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation,* —— U.S. ——, 58 L.Ed.2d 740, 767-768, 99 S.Ct. 740 (1979); *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 85 (1977); and *United States* v. *Antelope,* 430 U.S. 641, 645 (1977). *Cf., Fisher* v. *District Court,* 424 U.S. 382, 390-391 (1976); and *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 480 (1976). *See also* Johnson and Crystal, *Indians and Equal Protection,* 54 Wash.L.R. 587 (1979). The oft-repeated test is stated as follows:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

E.g., Morton v. *Mancari, supra* at 555.

This Court has recognized that the strict scrutiny test is not applicable to federal legislation concerning

Indians because of the unique legal status of Indians under federal law. In *United States* v. *Antelope, supra* at 645 and 646, this Court stated:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.
>
> * * * *
>
> . . . [F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . . [citing *Morton* v. *Mancari,* 417 U.S. 553 n.24].

Since the MBE provision of PWEA expressly applies to citizens of the United States who are "Indians, Eskimos and Aleuts," 42 U.S.C. § 6705(f)(2), it is clear from the decisions of this Court that the rational basis test is the applicable standard to judge the constitutionality of the MBE provision as applied to Indians. Furthermore, given the applicability of the rational basis test, the Court need not consider "the wisdom, need or appropriateness of the legislation" with respect to Indians as these are considerations which are properly left to Congress. *Olsen* v. *Nebraska ex rel. Western Ref. and Bond Association,* 313 U.S. 236, 246 (1941). Accordingly, judicial, administrative, or legislative "findings" such as findings of past discrimination are not necessary with respect to Indians where the rational basis test is employed.

II. The MBE Provision Is Rationally Related To Congress' Unique Obligation Toward The Indians .

The three primary sources of Congress' unique obligation to the Indians can be traced to the explicit reference in Article I, Section 8 of the United States Constitution granting Congress exclusive authority to regulate commerce with Indian tribes, to the treaty power of Article II, Section 2, Clause 2 of the Constitution, and to congressional authority to legislate with respect to the guardian-ward relationship between the federal government and the Indians. *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 171 n.7 (1973); *United States* v. *Kagama,* 118 U.S. 375 (1886); *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). Pursuant to this authority, the federal government has promoted Indian self-government and encouraged the employment and economic development of Indian individuals and enterprises. *See, e.g., Bryan* v. *Itasca County,* 426 U.S. 373, 426 U.S. 873, 388 n.14 (1976); *Fisher* v. *District Court,* 424 U.S. 382 (1976); *Arizona* v. *California,* 373 U.S. 546, 599-601 (1963); *Squire* v. *Capoeman,* 351 U.S. 1, 9-10 (1956); Indian Financing Act, P.L. 93-262, 88 Stat. 77, 25 U.S.C. § 1451, *et seq.;* §§ 701(b) and 703(i) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §§ 2000e(b) and 2000e-2(i); the Indian Self-Determination Act, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. § 450, *et seq.;* President's 1970 Message to Congress on Indians, 116 Cong. Rec. 23132-33 (1970).

Furthermore, this Court has recognized that employment preferences for Indians are directly related to the articulated federal goal of promoting tribal self-government. In *Morton* v. *Mancari, supra,* a case up-

holding an employment preference for Indians within the Bureau of Indian Affairs, this Court noted:

> [T]his preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an *employment criterion* reasonably designed to further the cause of Indian self-government .... [citations omitted] [emphasis added].

417 U.S. 553-554.[2]

Moreover, the federal obligation to Indians extends beyond the promotion of Indian self-government—it extends "more broadly" to justify special treatment for Indians in other areas as well. *United States* v. *Antelope, supra,* 430 U.S. at 646. *See also State of Washington* v. *Washington State Commercial Passenger Fishing Vessel Association,* —— U.S. ——, 61 L. Ed.2d 823, 837 n.20, 99 S.Ct. —— (1979); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); and *Winters* v. *United States,* 207 U.S. 564 (1908).

This Court has recognized the validity of Indian employment preferences in other areas. In *Morton* v. *Mancari,* this Court noted the comments of Senator Humphrey, the Senate sponsor of the Civil Rights Act of 1964, in explaining §§ 701(b) and 703(i) of Title VII of the Civil Rights Act which provided for preferential employment of Indians by Indian tribes or industries located on or near Indian reservations:

> This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians. 110 Cong. Rec. 12723 (1964).

417 U.S. at 546.

The application of these principles clearly establishes that the MBE provision is reasonably and rationally related to the federal government's obligation to the Indians. Indians are expressly included as beneficiaries under the MBE provision. Further, § 105(a)(1) of PWEA sets aside 2½% of PWEA funds to be expended *exclusively* for "public works projects under this chapter to Indian tribes and Alaska Native villages." 91 Stat. at 117, 42 U.S.C. § 6707(a)(1). Also the legislative history of PWEA notes "the extremely high unemployment rate on Western Indian reservations." H.R.Rep. No. 95-20, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S. Code Cong. & Admin. News 152. Furthermore, the 1976 Act (Local Public Works Capital Development and Investment Act of 1976, P.L. 94-369, 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735), which is extended and amended by PWEA, expressly includes Indian tribes as eligible public works grants recipients. 42 U.S.C. § 6701(3), and § 107(h)(2)(B) provides that the Secretary may receive applications for grants and projects "from Indian tribes and Alaska Native villages." 91 Stat. at 119, 42 U.S.C. § 6707(h)(2)(B). In light of the general congressional purpose behind PWEA to "help revitalize the Nation's financially-pressed communities," H.R.Rep. 95-20, 95th Cong., 1st Sess. 1, reprinted in 1977 U.S. Code Cong.

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[2] A lower federal court has also noted the relationship between Indian self-determination and Indian economic opportunities. In Livingston v. Ewing, 455 F.Supp. 825, 832 (D.N.M. 1978), *affirmed* 601 F.2d 1110 (10th Cir. 1979), the district court stated:

> Indian self-determination is meaningless if opportunities for self-support are destroyed. Therefore, it is clear that the policy is intimately and directly related to this one very legitimate, racially neutral state interest.

& Admin. News 150, and the specific references to Indians, it is clear that Congress, in enacting PWEA, was in part attempting to promote tribal government and Indian economic sufficiency. There is little doubt that these purposes are rationally related to Congress' unique obligation to the Indians. The MBE provision, therefore, is constitutional as applied to Indians.

CONCLUSION

Amicus agrees with the Solicitor General and the other *amici* that the MBE provision is constitutional as applied to all minorities, including Indians, under the strict scrutiny standard of review. If the Court does uphold the constitutionality of the MBE provision under this test, the decision should specifically note that the Act is also constitutional as applied to Indians.[8] However *amicus* asserts that the "rational relationship test" is the proper test of the constitutionality of the MBE provision as applied to Indians. *Amicus* further asserts that the MBE provision is consistent with and advances the trust relationship

[8] In Montana Contractors Association, et al. v. Secretary of Commerce, et al., 460 F.Supp. 1174 (D.Mont. 1978), the Court held the MBE provision unconstitutional as applied to Indians under the strict strutiny standard of review as the Court concluded that the required "findings" as to Indians were not present.

that Indians enjoy with the federal government. Accordingly, if the MBE provision is struck down by the Court under the strict scrutiny standard of review, the Court should either uphold the constitutionality of the MBE provision as applied to Indians, *see United States* v. *Jackson,* 390 U.S. 570, 585 (1968,) or specifically note that its decision does not address the constitutionality of the MBE provision as applied to Indians.

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Plaintiffs,

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JUANITA KREPS, *et al.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NATIONAL URBAN LEAGUE, INC., THE NATIONAL BANKERS ASSOCIATION, INC., AND THE NATIONAL BAR ASSOCIATION, AS *AMICI CURIAE*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NATIONAL URBAN LEAGUE, INC., THE NATIONAL BANKERS ASSOCIATION, INC., AND THE NATIONAL BAR ASSOCIATION, AS AMICI CURIAE

==========

INTEREST OF AMICI

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to

black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues regarding employment. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 747 (1976). The Legal Defense Fund believes that its experience in such litigation and the research it has done will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

The National Urban League, Inc., is a charitable and educational organization established as a not-for-profit corporation under the laws of the State of New York. For more than 69 years, the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, and by fostering better race relations and increasing understanding among all persons.

The National Bankers Association, a non-profit organization incorporated in 1972 under the laws of the District of Columbia, was founded

in 1927 as the National Negro Bankers Association. The National Bankers Association is a national trade organization for minority-owned and controlled banks. The purposes of the Association include strengthening minority financial institutions so that they can, in turn, promote economic progress in minority communities and by minority businesses. The Association has a particular interest in this case because of its possible impact on ongoing federal efforts to increase government deposits in minority banks.

The National Bar Association founded in 1925, is a professional membership organization which represents more than 10,000 black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession, and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the importance of affirmative action as a means of solving America's racial problems. The Association's officers are Robert L. Harris (President), William A. Borders, Jr. (President-Elect), George R. Burrell, Jr., Warren H. Dawson, Stuart J. Dunnings, Jr., Renee Jones Weeks (Vice Presidents), Arnette R. Hubbard (Secretary) and Arthenia L. Joyner (Treasurer).

SUMMARY OF ARGUMENT

The use of racial classifications for benign purposes is constitutionally permissible where it serves important purposes and does not represent a slur or stigma on any group. That construction of the Fourteenth Amendment, advanced by four members of the Court in Regents of University of California v. Bakke, 438 U.S. 265, 361 (1978), was supported by two additional Justices in United Jewish Organizations v. Carey, 430 U.S 144, 164 (1977). This standard is consistent with the legislative history of the Amendment, which was framed and approved by the same Congress that adopted a number of race-conscious laws designed to ameliorate the condition of blacks.

The fact that the MBE provision was not considered during the hearings on the 1977 Public Works Act is not fatal to its validity. The exigencies of the then-existing economic circumstances compelled Congress to act with extraordinary speed to enact the 1977 Act, and precluded as a practical matter inquiry into the experience of minorities under the 1976 Public Works Act. Minority set-asides were by 1977 a remedial device already in use by and familiar to the federal and state governments.

The debates on the MBE clause reveal that it was intended to overcome both present discrimination and the continuing effects of past dis-

crimination against minority businesses and minority employees. Each of these problems had been the subject of repeated and exhaustive past congressional hearings and reports, which supported the decision of Congress. Proponents of the clause also maintained that it alone would suffice to resolve the problems with which it was concerned. While this conclusion was not essential to the clause's validity, it too was fully supported by past congressional hearings and reports.

ARGUMENT

I. THE APPLICABLE CONSTITUTIONAL STANDARD

Resolution of the instant case requires a determination of the standard by which to measure the constitutionality of a racial classification established for a benign reason. This issue was considered but not finally decided in Regents of University of California v. Bakke, 438 U.S. 265 (1978). In Bakke only five members of the Court reached this question; four expressly rejected the traditional strict scrutiny test, holding instead that such a classification need only meet three less stringent requirements: (1) there must be "an important and articulated purpose for its use," (2) it must not "stigmatize any group," (3) it must not "singl[e] out those

least well represented in the political process to bear the brunt of a benign program." 438 U.S. at 361 (opinion of Justices Brennan, White, Marshall and Blackmun). The usual strict scrutiny test was also rejected by two additional members of the Court in United Jewish Organizations v. Carey, 430 U.S. 144 (1977). Part IV of Justice White's opinion in that case, which was joined in by Justices Stevens and Rehnquist, upheld as consistent with the Fourteenth Amendment the race-conscious drawing of district lines so long as such a plan represented no "racial slur or stigma with respect to whites or any other race." 430 U.S. at 165. This seems identical to the second requirement listed by the plurality opinion in Bakke. Thus a benign racial classification which satisfied the three requirements of the Bakke plurality would appear to command the support of a six-member majority of the Court.[1/]

This constitutional standard is strongly supported by the legislative history of the Fourteenth Amendment, which we set out at length

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1/ The standards in Bakke and United Jewish Organizations are not literally the same, although as a practical matter a classification failing the first or third Bakke requirement would probably fail as well the UJO test. The distinction between these standards does not affect the disposition of the instant case, and would not affect the validity of the racial classifications with which we are familiar. Accordingly we take no position on these alternative articulations of the underlying rule.

in our brief amicus curiae in Bakke.[2/] See 438 U.S. at 396-98 (Marshall, J.) That history reveals that the Congress which framed the Fourteenth Amendment contemporaneously debated and overwhelmingly approved a variety of programs limited to blacks, and regarded the Amendment as providing a constitutional basis for such programs.

In the years immediately preceding and following the framing of the Fourteenth Amendment, the Congress which authored that provision also enacted a series of race-conscious social programs. The combined impact of these programs was far greater than the affirmative action measures which have come before this Court. The racial classifications in those nineteenth century programs were far more exclusive than the measures common today; they were either limited to blacks alone, or included within their ambit only blacks and a nominal number of white loyalists who had fled the South.[3/] The 1865 Freedmen's Bureau Act[4/] established the Bureau to provide provisions, clothing and fuel for freedmen, to lease and

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2/ Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, No. 76-811, pp. 10-53 (hereinafter cited as "Amicus Brief").

3/ Amicus Brief pp. 19-42.

4/ 13 Stat. 507-508 (1865).

ultimately sell to them up to 40 acres of land, and to "control ... all subjects" relating to freedmen. Although the Bureau's authority also extended to white refugees, neither Congress[5/] nor historians[6/] regarded this provision as important, and the Bureau's programs, as Congress was aware, were in operation usually limited to freedmen.[7/] The 1866 Freedmen's Bureau Act, enacted over President Johnson's veto, authorized educational programs which were expressly limited to "freedmen."[8/] In 1867 Congress appropriated funds "for the relief of freedmen or destitute colored people in the District of Columbia,"[9/] with no provision for aid to destitute whites. In the same year Congress enacted the Colored Servicemen's Claim Act, providing for black veterans, and for them alone, special assistance in obtaining funds owed them by the government.[10/] The Freedmen's Bureau's programs for blacks were ultimately phased out by

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5/ Cong. Globe, 38th Cong., 1st Sess. 693 (1864); see Amicus Brief, pp. 21-23.

6/ G. Bentley, A History of the Freedmen's Bureau 47-49 (1955); P. Pierce, The Freedmen's Bureau 42-45 (1904).

7/ H.R. Exec. Doc. No. 11, 39th Cong, 1st Sess. (1865).

8/ 14 Stat. c. 200, 174-176 (1866).

9/ 15 Stat. Res. 4, 20 (1867).

10/ 14 Stat. Res. 368 (1866).

Congress on the assumption that its work would be continued by the states, an expectation that went unfulfilled for a century.

The racial classifications in this early legislation did not go unnoticed, but were the source of repeated but ineffective opposition in the Congress and on the part of President Johnson, who twice vetoed the 1866 Freedmen's Bureau bill on that basis.[11/] The arguments voiced in vain against this legislation closely resemble the contentions raised against affirmative action programs in our own time. Characterizing these measures as "class legislation",[12/] opponents objected that no comparable aid was being provided to equally needy whites.[13/]

> A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of

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11/ VIII Messages and Papers of the Presidents, 3610-11 (1914).

12/ See e.g., Cong. Globe, 39th Cong. 1st Sess. 37 (1866) (remarks of Congressman LeBlond); VIII Messages and Papers of the Presidents, 3623 (1914); Cong. Globe, 40th Cong., 1st Sess. 79 (1867) (remarks of Sen. Grimes).

13/ See e.g., Cong. Glove 39th Cong., 1st Sess. 297 (remarks of Sen. Stewart), 319 (remarks of Sen. Hendricks), 372 (remarks of Sen. Johnson), 372 (remarks of Sen. Davis), 401 (remarks of Sen. McDougall), 629 (remarks of Rep. Marshall); App. 71 (remarks of Rep. Chanler) (1866).

> Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or deficient education, would, in [our] opinion ..., be looked upon as the vagary of a diseased mind. Why the freedmen of African descent should become the marked objects of special legislation, to the detriment of the unfortunate whites, [we] fail to comprehend. 14/

It was urged that such programs would ultimately prove harmful to blacks, either by increasing their dependence 15/ or by provoking white resentment. 16/ Taxing whites to support programs aiding only blacks was criticized as unfair, 17/ and as giving blacks an unfair competitive advantage over whites. 18/

Proponents of such race-conscious legislation, however, successfully argued that such race-conscious legislation was justified by the

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14/ H. R. Rep. No. 2, 38th Cong., 1st Sess. 2, 4 (1864).

15/ Cong. Globe, 39th Cong., 1st Sess. 401 (remarks of Sen. McDougall) (1866).

16/ Id. at App. 69-70 (remarks of Rep. Rousseau).

17/ Id. at 362 (remarks of Sen. Saulsbury), 634, 635 (remarks of Rep. Ritter); App. 83 (remarks of Rep. Chanler).

18/ "Mr. Speaker, when I was a boy, and in common with all other Kentucky boys was brought in company with negroes, we used to talk, as to any project, about having 'a white man's chance.' It seems to me now that a man may be very happy if he can get 'a negro's chance.'" Id.

special needs of blacks 19/ and in the long term interest of all citizens. 20/ They emphasized that those special needs were the result of a long history of discrimination, and that the aid would help blacks to become self-supporting. 22/ A distinction was drawn between such benign race-conscious measures and invidious discrimination.

> One object of this bill is to ameliorate the condition of the colored men .... [Its opponents assert] the bill provides one law for one class of men, and another for another class. The very object of the bill is to break down the discrimination between whites and blacks. Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people. 23/

19/ See, e.g., id. at 365 (remarks of Sen. Fessenden), 568 (remarks of Rep. Donnelly); App. 75 (remarks of Rep. Phelps).

20/ See e.g., Cong. Globe, 40th Cong., 1st Sess. 444 (remarks of Rep. Scofield) (1867).

21/ See e.g., Cong. Globe, 39th Cong., 1st Sess. 322 (remarks of Sen. Fessenden and Sen. Trumbull) ("We shall not long have to support any of these blacks out of the public Treasury if we educate and furnish them with land upon which they can make a living for themselves.") (1866).

22/ See, e.g., id. at 589 (remarks of Sen. Donnelly), 630 (remarks of Rep. Hubbard).

23/ Id. at 631-32 (remarks of Rep. Moulton).

This distinction was apparently accepted by the majority of Congress, which consistently voted to adopt such race-conscious legislation.

The Fourteenth Amendment was fashioned and approved by the same Congress which had consistently adopted legislation with such "ameliorative" racial classifications. The Amendment was adopted in part to remove doubts as to the constitutionality of the Freedmen's Bureau bills,[24] which President Johnson had argued exceeded the authority of Congress.[25] The Freedmen's Bureau Act of 1866, the Reconstruction measure which probably contained the most important race-specific provisions, was considered and approved by Congress simultaneously with the Fourteenth Amendment.[26] The same legislators

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24/ J. tenBroek, Equal Under Law 201, 203 (1965); Cong. Globe, 39th Cong., 1st Sess. 1088 (remarks of Rep. Woodbridge), 1092 (remarks of Rep. Bingham) (1866).

25/ VIII Messages and Papers of the Presidents 3599 (1914).

26/ The House passed the Amendment on May 10, 1866, the Senate voted a modified version on June 8, 1866, and the House acquiesced in the Senate changes on June 13, 1866. Cong. Globe, 39th Cong., 1st Sess. 2545, 3042, 3149 (1866). The House approved the Freedmen's Bureau Act on May 29, 1866, the Senate voted a modified version on June 26, 1866, and the Conference Report was accepted on July 2 and 3, 1866. Id., at 2773,

who comprised the two-thirds majority necessary to override President Johnson's second veto of the Freedmen's Bureau bill also comprised the two-thirds majority that approved the Fourteenth Amendment. Of the 33 Senators and 104 Representatives who voted to override that veto, every one who was present for the vote also supported the Fourteenth Amendment.[27] Congressman Stevens, introducing the Fourteenth Amendment to the House, described its basic purpose as providing for "the amelioration of the condition of the freedmen."[28] These were the exact words used only three months earlier to describe the Freedmen's Bureau bill.[29] This identity of phrasing underlines the perceived compatibility of the two measures. The supporters of the Act and Amendment regarded them as both consistent and complimentary, while opponents viewed the two, together with the Civil Rights Act of 1866, as part of a

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26/ cont'd.

3413, 3524, 3562. On several occasions the Act was being debated in one house at the same time the Amendment was being debated in the other. See, e.g, id. at 2799, 2807, 2869, 2977.

27/ Id. at 3042, 3149, 3842, 3850.

28/ Id. at 2459.

29/ See p. 11, supra.

single coherent, though in their view undesireable, policy.[30/]

The Thirty-Ninth Congress, which was well aware of the race-conscious remedies and limitations contained in the Freedmen's Bureau bills it passed in February and July of 1866, cannot conceivably have intended by its approval of the Fourteenth Amendment on June 12, 1866, to invalidate or forbid such remedies. The debates in that Congress have an uncannily modern tone; the opposition to race-specific remedies was expressed in much the same terms as the contemporary arguments against measures such as the minority set-aside program. But the framers of the Fourteenth Amendment clearly regarded it as not merely permitting, but affirmatively authorizing such programs. Many of the race-conscious provisions adopted dealt with the problems of black farmers, the most important group of minority businessmen in nineteenth century America. In assessing that ameliorative legislation, the Thirty-Ninth Congress applied no special stringent standard, but inquired only whether it was reasonably calculated to serve an ameliorative purpose. That is the standard which this Court should apply

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30/ Cong. Globe, 39th Cong., 1st Sess. 2501 (remarks of Rep. Shanklin), 2537-8 (remarks of Rep. Rogers), 2941 (remarks of Sen. Hendricks); App. 239-40 (remarks of Sen. Davis).

in assessing the constitutionality of such measures.

II. THE ORIGIN OF THE MBE PROVISION

The petitioners focus their constitutional attack on the MBE provision on the congressional processes leading to its adoption, claiming that the lack of hearings on this provision is unjustifiable and virtually fatal to its validity. They regard the adoption of that measure in 1977 on the floors of the House and Senate as inexplicable and hasty, representing merely a seizure of federal funds for the black community to which the majority of Congress incomprehensibly, and erroneously, agreed. We suggest that the actual origin of the MBE provision is somewhat different. In adopting the 1977 Act, Congress was required to act with extraordinary speed to deal with the critical economic situation. Hearings concerning the experience of minorities under the 1976 Act were not possible because implementation of that statute was only just beginning. Congress acted reasonably in choosing a set-aside provision, an established federal and state device, to deal with the well-known general problems of minority contractors.

The Public Works Acts of 1976 and 1977 were adopted to address problems created by the reces-

sion which began in 1974, the worst economic downturn which the country had suffered in the past 40 years. Following the lifting of wage-price controls, and spurred by the dramatic increase in oil prices in early 1974, the annual inflation rate of the consumer price index rose from 3.4% in 1972 to 8.8% in 1973 and 12.2% in 1974.[31/] The Federal Reserve Board, with the support of the administration, raised the discount rate from 4.5% in 1972 to 7.8% in 1974, in the hope of cooling off the economy.[32/] This in turn caused the prime rate to rise in the same period from 5.25% to the then unheard of level of 10.81%.[33/] This greatly increased the cost of borrowing, slowing down capital investment, which fell 12% in real terms in 1974.[34/] Higher interest rates, together with the reduction in bank deposits due to the higher rates of return available elsewhere, reduced housing starts by 34% in that year.[35/] These events combined to produce in 1974 a reduction in the gross national product,

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31/ Economic Report of the President, 1979, p. 244. The same data can be found in editions from 1975 through 1978.

32/ Id. p. 258.

33/ Id.

34/ Id. p. 235.

35/ Id. p. 224.

and an increase in the unemployment rate from 4.9% to 5.6%.[36/]

By January of 1976, these economic and fiscal policies had reduced the inflation rate from 12.2% to 7.0%,[37/] but the unemployment rate for 1975 had risen to 8.5% and 7.8 million people were out of work,[38/] almost twice as many as in 1973. Unemployment benefits in 1975 had totaled $16.8 billion, and were on the verge of bankrupting several state unemployment agencies. In these difficult circumstances a debate began as to whether federal policies should continue to focus on the problem of inflation, at the risk of continuing the recession, or should emphasize instead stimulating the economy and reducing unemployment. The President urged the former approach, while a majority of Congress supported the latter. To implement its preferred policy Congress began work on a public works program, which would inject additional funds into the economy and which permitted the focusing of those funds on the construction industry, particularly hard hit by the recession. Congress adopted in July 1976, over the President's veto, the Local

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36/ Id. p. 217.

37/ Id. p. 244.

38/ Id. pp. 216, 221.

Public Works Capital Development and Investment Act of 1976. 90 Stat. 889. The 1976 Act mandated the granting of $2 billion in aid to state and local governments. The effectiveness of this program required that the funds be spent immediately, while the economy was still struggling to pull out of the recession, and that they be spent over a short period of time so as not to dissipate their stimulative effect. Congress therefore required the Economic Development Administration ("EDA") to publish implementing regulations within 30 days, 42 U.S.C. § 6706, and to act on any application within 60 days, 42 U.S.C. § 6706, and provided that any project for which funds were awarded must begin within 90 days of EDA approval, 42 U.S.C. §6705(d).[39/]

The economic situation confronting the incoming administration in January, 1977, was even more complex. The unemployment rate in December, 1976 was 7.8%, the same level as January, 1976, and higher than the 7.3% rate reached in May of that year.[40/] The gross national product, which had

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39/ Funding was also available for projects funded in part by other federal laws if those other funds were available "immediately." 42 U.S.C. § 6703. The funding of projects jointly with state or local contributions was permitted only if the needed contributions were available "immediately." 42 U.S.C. § 6704.

40/ Economic Report of the President, 1977, p. 221.

increased at a healthy 9.2% annual rate during the first quarter of 1976, had risen only 3.0% during the last quarter.[41/] The Council of Economic Advisors concluded that the decline of the GNP growth rate was the result in part of sluggish spending by federal, state and local governments; government purchases in constant dollars had fallen 4.9% during the first quarter, and had risen only 0.4% over the entire year.[42/] The inflation rate had fallen considerably, from 7.0% in December, 1975 to 4.8% in December, 1976.[43/]

Under these circumstances the new administration, which had been elected on a platform placing unemployment ahead of inflation as its first priority, decided that strong measures were necessary to stimulate the economy. It was also aware, however, as was Congress, that time was of the essence; if additional federal spending were to have the desired effect, it had to occur while the economy was still in its then sluggish condition. If the funds were not actually expended until after a healthy growth rate had

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41/ Id. p. 59.

42/ Economic Report of the President, 1979, p. 244. The 1977 Act had found that reduced state and local government spending tended "to undermine the Federal Government's efforts to stimulate the economy." 42 U.S.C. § 6721.

43/ Id.

begun, those funds, far from helping the economy, would tend to overheat it and cause increased inflation.

Accordingly, both the incoming administration and the Congress acted with unprecedented but essential speed. On January 4, 1977, Congressman Roe, chairman of the Economic Development Subcommittee of the House Public Works Committee, introduced H 78, calling for an additional $4 billion in public works expenditures.[44/] On January 7, 1977, the President-elect met with congressional leaders and agreed upon an economic stimulus package that included that $4 billion for emergency public works.[45/] A similar bill was introduced in the Senate on January 25 by Senator Randolph.[46/] The details of the administration's proposals became known the next day.[47/] On January 27, the Secretary of the Treasury testified in support of the stimulus package, urging that the funds should be spent "as quickly as good management allows" and that "speed is clearly

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44/ 123 Cong. Rec. H 78 (daily ed. January 4, 1977).

45/ New York Times, January 8, 1977, 1:5, 6:3.

46/ 123 Cong. Rec. S 1349 (daily ed. January 25, 1977).

47/ New York Times, January 26, 1977, 1:6.

of the essence."[48/] The President's Message on the Economic Recovery Act stressed "the need for an immediate stimulus to government purchasing power" and urged "prompt" action.[49/] House[50/] and Senate[51/] hearings on the proposals were completed on February 4, 1977, barely a month after the proposal was introduced in the House, and only 10 days after its introduction in the Senate. The House report was issued on February 16,1977, and the bill reached the floor and was passed on February 24, 1977.[52/] The Senate Report was released on March 4, 1977, and the Senate approved the bill 6 days later.[53/]

48/ Hearings on the Conduct of Monetary Policy Before the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 3, 12 (1977).

49/ H. Doc. 95-68 95th Cong., 1st Sess. 123; Cong. Rec. H 653 (daily ed. Feb. 1, 1977).

50/ H. Rep. 95-20, p. 2 (1977).

51/ S. Rep. 95-38. (1977). The report stated that the Funds were "urgently needed." Id. p. 3.

52/ 123 Cong. Rec. H 1401-H 1462 (daily ed., Feb. 24,1977).

53/ 123 Cong. Rec. S3851-S3928 (daily ed. March 10, 1977).

In urging quick passage of the bill Senator Randolph explained:

> The timing of public works projects, of course, is very important. There are economic peaks and valleys in America, which we call recession or depression ... Today ... we have unemployment of perhaps 8 million people. We now understand that these types of public works projects do much to offset the fluctuation of business cycles. We need this legislation now, because in most of our country, at least a considerable portion, the spring is the time when these projects can get underway. We do not want to wait until the middle of the summer and let the fall and the colder months of the year approach again. We want the beginning of these projects in what I call the construction season. 54/

Congressman Roe called for

> [p]rompt enactment [to] enable the EDA to immediately release the additional funds for those applications already on file, and put our people back to work .... [T]he Committee ... very carefully designed this program so that it could be implemented as efficiently and expeditiously as possible, avoiding the long lag time sometimes associated with public works construction. We designed this program to have an immediate anti-recessionary impact on the economy. 55/

54/ 123 Cong. Rec. S3858 (daily ed. March 10, 1977).

55/ 123 Cong. Rec. H 1401 (daily ed. Feb. 24, 1977).

In signing the 1977 Public Works Act the President emphasized that it would provide "immediate funding" for construction projects.56/

It was in the context of this widely recognized need for extraordinarily prompt action, resulting in the enactment of a major piece of legislation with virtually unprecedented but clearly essential speed, that the MBE provision was added to the bill. Under the 1976 Public Works Act the first grants were only announced on December 26, 1976.57/ The House and Senate hearings held barely a month later dealt almost exclusively with the formulas and criteria used to pick the projects chosen on December 26, 1976. To a significant degree these formulas and criteria, which were widely criticized as directing funds to areas with very little unemployment, were known from regulations issued by EDA well prior to December. On the other hand, because the first grants to state and local governments were only announced in late December, the process of letting of contracts by those governments could only commence after that date, and those contracts generally required a time-consuming competitive bidding process; thus the actual awarding of contracts was only just beginning on February 4, 1977, when the congressional hearings ended. The

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56/ Public Papers of the President, Jimmy Carter, 1977, p. 870.

57/ S. Rep. 95-38, p. 2 (1977).

hiring of the workers who ultimately received employment under the 1976 Act was only to occur later yet. And although EDA kept detailed statistics on which cities and states won grants, it does not appear to have had similar data available regarding the race of contrators or their employees.[58/]

Thus the detailed hearings and reports which petitioners urge should have preceeded adoption of the MBE provision were utterly inconsistent with the economic exigencies with which Congress was concerned. Such a congressional inquiry regarding minority contractors and employees under the 1976 Act would have required months, and Congress did not have months to spare. Because of the dispatch with which it was enacted, funds for the 1977 Public Works Act became available in the late spring and early summer of 1977, when the unemployment rate averaged over 7% and the inflation rate was falling to under 5%. But had the Act been delayed six months, it probably would have been counter productive. By January 1978, the unemployment rate had fallen to 6.3%,[59/] total unemployment had fallen by 800,000,[60/] and

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58/ See Comptroller General, Minority Firms on Local Public Works Projects -- Mixed Results, p. 8 (1979). Experience Under the 1977 Act indicated minority participation under the earlier Act was low. Id.

59/ Economic Report of the President, 1979, p. 217.

60/ Id. p. 216.

inflation was up to 9.6%.[61/] In 1978 the administration shifted its economic policies away from stimulation of the economy, reducing federal spending and tightening fiscal and monetary policies.[62/] Thus the delay required for an inquiry into the administration of the 1976 Public Works Act would have defeated the entire purpose of the 1977 Act.

The limited information which was available at the time of the February, 1977 hearings, indicated that EDA's allocation policies had had a pronounced discriminatory impact against predominantly black communities. A study by the Michigan Advisory Committee to the United States Commission on Civil Rights revealed that the average per capita grant in towns over 90% white was almost three times as high as the average grant in towns under 90% white.[63/] Minorities made up 22.5% of the population in the funded districts, but received only 12.3% of the funding.[64/] This occurred despite the fact that unemployment was far higher in predominantly black communities

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61/ Id. p. 244.

62/ Id. pp. 25, 28.

63/ The average per capita grant was $47.32 in towns over 90% white and $16.48 in towns under 90% white. Hearings before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess. p. 814 (1977).

64/ Id. p. 825.

than in predominantly white communities. Congressman Conyers of Michigan, who testified about this allocation problem, also expressed concern about minority contractors and employees.

> I have been contacted by individuals who believe that minorities and women have been deprived of employment and contracting opportunities on LPW-funded projects. I have not had time to investigate their allegations, but the historical pattern of discrimination within the construction industry lends credence to their charges. For the next few days, my staff will study this matter. If it appears that minorities and women do suffer discrimination under this program, I will propose an amendment to strengthen the nondiscrimination provision contained in the current Act. (Emphasis in original). 65/

But the hearings ended on the day Representative Conyers testified, and the House committee issued its report shortly thereafter. Thus the only route open for protecting minority contractors and employees was to offer an amendment on the floor of the House.

Conyers reported to the House that:

> EDA's Office of Civil Rights apparently made little effort to closely review affirmative action and civil rights compliance data within individual applications. 66/

He also noted his office was "replete with examples" of minority contractors unable to

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65/ Id. p. 939. The 1976 Act contained a general prohibition against discrimination. 42 U.S.C. § 6709.

66/ 123 Cong. Rec. E 973 (daily ed. Feb. 24,

win contracts because of the "intricacies" of the bidding process.67/

The solution supported by Conyers was the MBE provision which is the subject of the instant action. The amendment was offered by Congressman Mitchell, rather than by Congressman Conyers, apparently because Mitchell was the leading House proponent of minority business enterprises, and had less than a month before he offered a bill to require that virtually all federal procurement and construction contracts be subject to a minority set-aside requirement.68/ Giving minority business enterprises preferential treatment in bidding for federally-funded contracts was not a novel proposal. Since 1968 the Small Business Administration, acting under section 8(a) of the Small Business Act of 1953, 15 U.S.C. § 637(a), had arranged for procurement contracts to be let to minority firms without any requirement of competitive bidding. The contracts let in this manner involved thousands of minority firms and hundreds of millions of dollars.69/ Other federal agencies maintained various programs setting

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67/ Id. H 1440.

68/ 123 Cong. Rec. H 611-H 613 (daily ed. Jan. 31, 1977).

69/ See Joint Hearing on Minority Contracting Before the Senate Select Committee on Small Business and the Subcomittee on Minority Enterprise and General Oversight of the House Small Business Committee, 95th Cong., 2d Sess. 5 (1978).

minimum levels of minority contractor participation.[70] The committee draft of the 1977 Public Works Act already contained a set-aside provision, reserving 2 1/2% of the funds for public works projects for "Indian tribes and Alaska Native Villages."[71] In proposing utilization of this approach, Congressman Mitchell and Senator Brooke emphasized that it had long been used by the federal government,[72] and that specifying the portion of government contracts to be so set aside was already a common practice among state governments.[73] Thus, when Congress adopted the MBE provision to achieve its purposes, it invoked not a radical and unprecedented solution, but a well-established device with which both the federal and state governments had substantial experience.

Under the then-existing economic circumstances, the procedures leading to the adoption of

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70/ Comptroller General, Minority Firms on Local Public Works Projects -- Mixed Results, p. 5 (1979).

71/ See 42 U.S.C. § 6707(a)(1).

72/ 123 Cong. Rec. H 1437 (daily ed. Feb. 24, 1977); 123 Cong. Rec. S 3910 (daily ed. March 10, 1977).

73/ Id. H 1437-38, H 1440. Set-aside programs in Illinois and Colorado were described in United States Commission on Civil Rights, Minorities and Women as Government Contractors, pp. 102-104 (1975).

the MBE provision were not merely understandable, but the only manner in which Congress could have addressed the underlying problems. If, as petitioners suggest, Congress can only adopt race-conscious remedies after exhaustive committee hearings and detailed committee reports, then Congress would be powerless to address such racial issues during an economic or other crisis. It is inconceivable that the Fourteenth Amendment compels such a conclusion. When that Amendment was adopted, congressional hearings were infrequent and committee reports were often perfunctory. Constitutional constraints on congressional procedures are spelled out expressly in Article I, which requires neither hearings nor reports, but only a majority vote of both houses to adopt legislation.[74] It would be inconsistent with the separation of powers for this Court to impose on Congress other more detailed rules for the fashioning of legislation. Congress regularly adds and deletes billions of dollars from the federal budget on the floor of the House or Senate based on debates compared to which the instant legislative history is fulsome. Momentous legislation often comes into being as a floor

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74/ Jefferson's Manual of Parliamentary Practice, used by both houses in the early years of the Republic, regarded resort to committees as optional. Section XXVI (1977).

amendment; the 1968 fair housing legislation, for example, was adopted by the Senate as an amendment to a bill dealing primarily with riots, Indian rights, and violent interference with federally protected activities. Congressional committees have been both roundly condemned as inefficient and praised as essential[75/] and cogent arguments could doubtless be made for increasing or decreasing their role, but that is a matter confided to the discretion of the Congress. The Fourteenth Amendment no more enacted General Henry Robert's Rules of Order that it enacted Mr. Herbert Spencer's Social Statics.[76/]

III.

III. THE PURPOSES OF THE MBE PROVISION

The purposes which prompted Congress to adopt the MBE provison were clearly articulated on the floors of both the House and the Senate. Because of the time constraints noted above, little information was available about the administration

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75/ See, e.g., R. Nader, Ruling Congress (1975); T. Murphy, Politics of Congressional Committees (1978); N. Ornstein, Changing Congress: The Committee System (1974).

76/ Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Ferguson v. Skrupa, 372 U.S. 726, 728-733 (1963).

of the 1976 Public Works Act in particular, and Congress relied primarily on its knowledge of the general practices of contracting officials and federal contractors. The dismal record that had been compiled by those past practices had been the subject of repeated reports by or to the Congress, and was a record with which the Congress was quite familiar. No reason appeared then or since to believe that the administration of the 1976 Public Works Act had been significantly better than that general record, and the petitioners do not assert that Congress was not justified in relying on the broader record.

(1) Overcoming Discrimination-Based Problems of Minority Business Enterprises

Both the House and Senate proponents of the MBE provision based it in part on the need to assure minority businessmen a "fair share" of federal public works funds.[77/] Congressman Biaggi urged,

> Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be remedied. ...[W]ithout adoption of this amendment, this legislation may be potentially inequitable to minority business and workers. [78/]

77/ 123 Cong. Rec. H 1436 (remarks of Rep. Mitchell) (daily ed. Feb. 24, 1977).

78/ Id. H 1440.

Senator Brooke also noted with alarm the small number of minority businesses among federal contractors.[79/]

These statements reflect not the uninformed whim of legislators seeking favors for their constituents, but the culmination of almost a decade of congressional inquiry and action concerning minority businesses. The problems of minority business first became a major federal priority in 1969 when President Nixon signed Executive Order 11458, providing for the development of a national program to assist "the establishment, preservation and strengthening of miniority business enterprise." Section 1(a)(i). In 1971 and 1972 the subcommittee on Minority Small Business Enterprise of the House Small Business Committee conducted extensive hearings on the obstacles facing minority businessmen. It concluded that the obstacles had their roots in past racial discrimination. "These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H. Rep. 92-1615, p. 3. The "long history of racial bias" to which minorities had been subjected invariably led, it found, to the lack of capital and experience which seriously handicapped the efforts of minority entrepreneurs. Id. at 3-4.

79/ 123 Cong. Rec. S 3910 (daily ed. March 19, 1977).

In 1975 that House subcommittee again conducted several days of hearings on this subject, and found the continuing problems of minority businesses to have the same origin.

> The effect of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in the present economic inequities. 80/

The subcommittee reiterated that conclusion on January 3, 1977, two years later:

> The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter

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80/ H. Rep. 94-468, pp. 1-2.

> a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. 81/

This latter report was issued less than two months before the adoption of the MBE provision by the House.

To eliminate the continuing effects on minority businesses of past discrimination, the federal government had adopted over 100 programs to aid minority businesses. These programs included financial, marketing and business management assistance.82/ But despite the substantial federal efforts to create and sustain minority businesses, those firms received less than one percent of all federal contracts. Congressman Mitchell argued that such contracting practices were frustrating federal policy:

81/ H. Rep. 94-1791, p. 182; see also S. Rep. 91-1343, p. 45 (1970). A federal task force reached the same conclusion. Report of the Task Force on Education and Training for Minority Business Enterprise, p. 17 (1974) ("Decades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system.")

82/ U.S. Department of Commerce, Office of Minority Business Enterprise. Federal Assistance Programs for Minority Business Enterprises (1977).

> We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, "We will create you on the one hand and, on the other hand, we will deny you." That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. 83/ . . . . [W]e approve a budget for OMBE [Office of Minority Business Enterprise], we approve a budget for the SBA, and we approve other budgets to run those minority enterprises, to make them become viable entities in our system, but then on the other hand we say no, they are cut off from contracts.

Mitchell urged that legislation mandating that contracts be awarded to minorities were needed because "every agency of the Government has tried to figure out a way to avoid doing this very thing."84/ The United States Commission on Civil Rights had reported to Congress less than two years before that minority-owned firms faced a serious problem of intentional discrimination because "[g]overnment contracting officers expressed biases against minority firms...."85/

83/ 123 Cong. Rec. H 1436-7 (daily ed. Feb. 24, 1977).

84/ 123 Cong. Rec. H 1438 (daily ed. Feb. 24, 1977).

85/ Minorities and Women as Government Contractors, p. 112 (1975); see also pp. i, 20-22.

Thus the MBE provision was adopted and needed to overcome both ongoing discrimination and the continuing effects of past discrimination.

(2) Reducing Black Unemployment

The central focus of the hearings and debate regarding the 1977 Public Works Act was the need to assure better targeting of the construction funds to areas of high unemployment. The hearings indicated that funds had too often gone to affluent white areas with little, if any, unemployment. This was not only unfair, but economically unsound, since increased demand for labor in areas of low unemployment was likely to be inflationary.

Senator Brooke urged that the MBE provision was an important way to insure "moneys are properly targeted."[86/]

> It is an appropriate concept because minority business' work forces are principally drawn from residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens. Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues throughout this country. [87/]

86/ 123 Cong. Rec. 3910 (daily ed. March 10, 1977).

87/ Id.

Congressman Biaggi, arguing in a similar vein, noted that unemployment among minority groups was running "as high as 35 percent", and that the amendment was needed to avoid "potential inequities to ... workers" and would provide "great benefit to the entire minority community."[88/]

Congress' concern about minority unemployment was well founded. In January, 1977, unemployment was 12.7% among non-whites, compared to 6.8% among whites.[89/] By March of that year white unemployment was falling while non-white unemployment was actually rising.[90/] Teenage unemployment exceeded 36% among non-whites, over twice the rate among white teenagers.[91/] The history and magnitude of discrimination against minorities in the construction industries was well-documented and well-known.[92/] Congress was justifiably concerned that a federal spending program involving construction was especially likely to afford a disproportionately small number of jobs to minor-

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88/ 123 Cong. Rec. H 1440 (daily ed. Feb. 24, 1977).

89/ Economic Report of the President, 1979, p. 218.

90/ Id. By November white unemployment had fallen to 5.9%, while the non-white rate had risen to 13.5%.

91/ Id.

92/ See, e.g., United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1976).

ities among whom unemployment was the highest. The proportion of minority employees in minority-owned firms is substantially higher than in white-owned firms.[93] Under these circumstances Congress properly resorted to "targeting" minority businesses as a method of targeting unemployed minorities.

(3) The Lack of Available Alternatives

The petitioners urge that the MBE provision must be struck down because it was not the "least onerous" method of achieving Congress' purposes.[94] No such requirement, in our view, is imposed by the Constitution on benign racial classifications. Moreover, no reason appears to characterize the MBE provision as less "onerous" than the alternatives pressed by petitioners, such as cash advances to minority contractors.[95] If such alternatives were successful, they would still result in recipient minority businessmen winning contracts, and white businessmen losing them, because of the race of each. The effect

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93/ See, e.g., Hearings on SBA's 8(a) Subcontracting Program Before the Subcommittee on Government Procurement of the Senate Small Business Committee, 92nd Cong., 1st Sess. 83 (1971). The MBE provision in fact "provided employment for minorities that otherwise would not have been available." Comptroller General, Minority Firms on Local Public Works Project -- Mixed Results, p. 14 (1979).

94/ Brief for Petitioners, pp. 21-28.

95/ Id. p. 22.

on the losing bidder would be no less substantial, but only less overt.

In any event, Congress clearly believed that only the MBE clause would suffice to achieve its purposes. Representative Mitchell argued that set-asides were "the only way we are going to get minority enterprises into our system".[96] Senator Brooke urged the provision was

> necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders, and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool. 97/

The failure of the alternative approaches urged by petitioners, and attempted in the past, was documented in detail by a series of congressional reports[98] and hearings[99] and a report of the

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96/ 123 Cong. Rec. H 1437 (daily ed. Feb. 24, 1977).

97/ 123 Cong. Rec. S 3910 (daily ed. March 10, 1977).

98/ S. Rep. 94-636, pp. 221-227 (1976); S. Rep. 91-1343, pp. 45-50 (1970); H. Rep. 94-1791, pp. 124-149 (1977); H. Rep. 94-468 (1975); H. Rep. 92-1615 (1972).

99/ Hearing on the Small Business Administration § 8(a) Contract Procurement Program before the Senate Committee on Small Business, 94th Cong., 2d Sess. (1976); Hearings on SBIC and SBLC Programs

United States Commission on Civil Rights.[100] The need for immediate expenditure of the $4 billion in grants during the spring and summer of 1977

99/ cont'd.

and Selected SBA Actitities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business, 94th Cong., 1st Sess. (1976); Oversight Hearings on Small Business Administration Programs and Activities Before the Subcommittee on SBA Oversight and Minority Enterprises of the House Committee on Small Business, 94th Cong., 1st Sess. (1976); Hearings on Procurement Assistance Programs of the Small Business Administration Before the Senate Committee on Small Business, 94th Cong., 1st Sess. (1975); Hearings on Minority Enterprise and Allied Problems of Small Businesses Before the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business, 94th Cong. 1st Sess. (1975); Hearings on Government Minority Enterprise Programs -- Fiscal Year 1974, before the Subcommittee on Minority Small Business Enterprises and Franchising of the House Committee on Small Business, 93rd Cong., 2d Sess. (1974); Hearings on SBA's 8(a) Subcontracting Program -- Minority Enterprise before the Subcommittee on Government Procurement of the Senate Committee on Small Business, 92nd Cong., 1st Sess. (1971); Hearings Before the Subcommittee on Minority Small Business Enterprises of the House Committee on Small Business, 92nd Cong., 1st Sess. (1971).

100/ Minorities and Women as Government Contractors (1975); see also Comptroller General, A Look at How the Small Business Administration's Investment Company Program for Assisting Disadvantaged Businessmen Is Working, p. i, ii (1975).

precluded further experimentation with remedial devices. It was too late for new training or aid for minority enterprises to have any imapct, and there was no time to set up or operate any complex administrative machinery. The 10% set-aside program was indeed far more effective than the earlier programs, channeling more contract dollars to minority businesses in a few months than they had received in 10 years under the section 8(a) program of the Small Business Administration.[101]

Under these circumstances, Congress had only two alternatives -- to adopt the minoity set-aside clause, as an effective but short term expedient, or to increase spending under the Public Works Act without that clause, knowing that to so so would both undermine past congressional efforts to aid minority businesses and defeat the present con-

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101/ Comptroller General, Minority Firms on Local Public Works Project -- Mixed Results, p. 9 (1979).

gressional purpose to reduce minority unemployment. Neither the Constitution nor considerations of public policy compelled the latter course.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*, *Petitioners,*

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES, *et al.*, *Respondents.*

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AS *AMICI CURIAE*

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Interest of the Amici

A. The National Association for the Advancement of Colored People

The National Association for the Advancement of Colored People (NAACP) is the oldest and largest civil rights organization in America, with 500,000 members in 1,800 branches throughout the country. The NAACP appears frequently in this Court representing the interest of blacks and other minorities and often files briefs *amicus curiae* in cases of special importance to Negro Americans.

The case presently before the Court is of particular concern to the NAACP because it involves consideration of the statutory protection which Congress has extended to the minority construction industry. Over the years, the NAACP has expended a large proportion of its resources in attempting to open the nation's construction industry to black workers and contractors. We have often filed suit against construction labor unions and contractors as well as public agencies dispensing funds for public construction projects where blacks and others were excluded from employment opportunities. See: *Volger* v. *McCarty, Inc.*, 407 F.2d 1047 (CA 5, 1969); *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023 (CA 6, 1973); *Dobbins* v. *IBEW Local 212*, 292 F.Supp. 413 (S.D. Ohio 1968); *Ethridge* v. *Rhodes*, 268 F.Supp. 83 (S.D. Ohio 1967). We have persistently urged Congress and the executive branch to create programs such as the one at issue in order that blacks would finally have opportunities to share in the federal largesse of building construction. Over the last decade, the NAACP has conducted surveys of minority construction concerns and has participated with the Department of Housing and Urban Development in organizing minority firms and obtaining bonding for them so that they could bid on federally financed projects.

The instant case presents a challenge both to the statutory device containing the greatest potential for admitting blacks into the construction industry and to the very authority of Congress to enact such remedial legislation. If the Petitioners are successful in this challenge, blacks and other minorities will once again be relegated to their historic statistical invisibility in the nation's construction industry and the Congress will presumably be obliged to find some alternative means for preventing the public financing of private racial exclusion.

B. The United Auto Workers of America (UAW)

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents some 1,500,000 active workers and their families, in the automobile, aerospace, agricultural implement and related industries. Including spouses and children, UAW represents more than 4½ million persons throughout the United States and Canada. The UAW, since its founding days in the mid-30's, has worked diligently against all forms of discrimination and racism and in favor of affirmative action.

The effect of the government program challenged in this case is to encourage the formation and success of minority construction businesses, a development long overdue in our society. One important side-effect of having an increased number of minority-owned contractors is an expanded pool of trained minority craftspersons. The government program in question therefore makes a significant contribution to the UAW's efforts toward increased minority representation among the skilled trades workers it represents.

We believe that affirmance by this Court of the decision below is a necessity for further progress towards minorities obtaining their rightful economic place in our society, both as entrepreneurs and as employees.

Consent of the Parties

With the consent of the parties pursuant to Rule 42 of the Supreme Court Rules, Amici respectfully submit this brief in support of the Respondents.

Summary of Argument

The legislation here in issue, the minority set-aside provision of Public Law 95-28, 42 U.S.C. § 6705(f)(2), is appropriate remedial legislation under the 14th Amendment that does not offend the due process clause of the 5th Amendment. As applied to Negroes, it is constitutional as an exercise of Congressional authority under Section 2 of the 13th Amendment.

The narrowly drawn statute is a Congressional response to a known pattern of discrimination against minorities in the construction contracting industry. Such a pattern has been documented in numerous reports to Congress and other governmental documents available to it. In responding to this well-documented problem, Congress has made a finding that the rights of minorities have been violated and has enacted appropriate remedial legislation, as envisioned by this Court in the opinion of Justice Powell in *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978).

As applied to Negroes the statute is supported by Congress' power, under Section 2 of the 13th Amendment, to legislate to eliminate the badges and incidents of slavery, recognized by this Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). It is consistent with a long history of affirmative action by Congress benefitting the decendants of freedmen, beginning with legislation extending the Freedmen's Bureau and continuing to date.

The set-aside provision is therefore constitutional under Congressional authority derived from both the 13th and 14th Amendments.

ARGUMENT

I.

The Minority Set-Aside Provision of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), Does Not Violate the Due Process Clause of the Fifth Amendment to the United States Constitution.

A. *The Statute Is Constitutional If Supported by Adequate Congressional Findings of Past Discrimination and Appropriate Remedial Intent.*

The decision by Congress to guarantee, *where possible,* a proportion of federally financed construction work to minority contractors has been attacked here as race-based legislation, involving an inherently suspect classification and requiring "strict scrutiny" by this Court. Whether this legislation is to be measured by the "strict scrutiny" standard, as the courts below have done, or whether it may be measured by a somewhat more relaxed standard of review reserved for appropriate remedial legislation, the statute is well within Congressional enactment authority.

In *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978), this Court considered in depth the applicability of the Equal Protection Clause to affirmative action programs. Justice Powell, in the opinion announcing the judgment of the Court, describes as proper precisely the type of legislation involved here.

> "Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination. E.g., *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (CA 3), cert. denied, 404 U.S. 954, 30 L. Ed. 2d 95, 92 F. Cp. 98 (1971); *Associ-*

ated General Contractors of Mass., Inc. v. *Altschuller,* 490 F.2d. 9 (CA 1 1973), cert. denied 416 U.S. 957, 40 L. Ed. 2d 307, 94 S. Ct. 1971 (1974); cf. *Katzenbach* v. *Morgan,* 384 U.S. 641, 16 L.Ed. 2d 824, 86 S. Ct. 1717 (1966)." 438 U.S. at 301-302.

His opinion also noted,

> "Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan,* 384 U.S. 641, 16 L. Ed. 2d 824, 86 S. Ct. 1717 (166); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968). *We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate measures."* 438 U.S. at 302 fn. 41 (Emphasis added).

Four members of this Court would have gone even further, describing "the central meaning of [the *Bakke*] opinions" as:

> "Government may take race into account when it acts not to demean or insult any racial groups but to remedy disadvantages cast on minority by past prejudice, at least when appropriate finding has been made by judicial, legislative or administrative bodies with competence to act in this area." 438 U.S. at 325 (Brennan, White, Marshall and Blackmun, JJ. concurring in part and dissenting in part).[1]

[1] Though the remaining four members of this court did not reach the constitutional question, having decided the case on statutory grounds. 438 U.S. at 408-412, 421 (Stevens, Stewart, Rehnquist, JJ. and Burger, C.J., concurring in part and dissenting in part).

The minority set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. Section 6705(f)(2), meets the test of adequate Congressional findings of prior discrimination in the construction industry, as well as being narrowly tailored to achieve its remedial purpose. The legislation, moreover, may be viewed as enacted pursuant to Congressional power under both the Fourteenth and Thirteenth Amendments. It is therefore not in violation of the Equal Protection Clause of the Fourteenth Amendment, as incorporated and made applicable to the federal government by the Due Process Clause of the Fifth Amendment. See, e.g., *Bolling* v. *Sharpe,* 374 U.S. 497, 499 (1954).

B. *The Statute, Its History and Context Reflect That It Was Intended as Remedial Legislation Designated to Correct a Gross Exclusion of Minorities From the Federally Financed Construction Industry.*

The brief legislative history of the statute, placed in its context of years of efforts by the Congress and the executive to bring minorities into the mainstream of federal contracting, amply demonstrates a compelling need for such remedial measures. The operation of the statute which allows flexibility in applying its requirements is well suited to the purpose of the statute. The failure of a variety of measures attempted by the federal establishment in this area over the last decade underscores the virtual lack of viable alternatives to a set-aside guarantee.

The circumstances surrounding the passage of the ten percent set-aside clause of P.L. 95-28, the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), are well described by the courts below in this case. *Fullilove* v. *Kreps,* 443 F. Supp. 253 (S.D.N.Y. 1977), *aff'd.,* 584 F.2d 600 (CA 2, 1978). Because the amendment was urged on the floor of the House during debate on the bill, the brief remarks of the bill's supporters constitute the statute's

limited legislative history. Notwithstanding this truncated legislative history, the courts below are quite correct in ascertaining that Congress intended the amendment to provide minority business enterprises (MBE's) with a guaranteed inclusion in the federal effort to relieve a financially depressed sector of the economy.

The amendment was not proposed or adopted in an information vacuum. Congress had before it extensive prior Congressional testimony and findings concerning the absence of blacks and other minorities from participation in building construction nationally. From 1941 to 1946, the Fair Employment Practice Committee repeatedly investigated and documented the exclusion of black workers from the federally financed, craft union-controlled wartime construction industry.[3] More recently, the U. S. Commission on Civil Rights has reported to Congress and the Executive on the exclusion of minorities from the national construction industry.[3] In its 1975 report to the President and the Congress on minorities and women as government contractors, the Commission documented the failure of several affirmative efforts to bring minority contractors into the mainstream of federally funded projects. See, U.S. Commission on Civil Rights, *Minorities and Women as Government Contractors,* May, 1975.

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[3] See, Hill, H., *Black Labor and The American Legal System,* 235-47 (1977). Prof. Hill points out that during World War II, the government itself entered into a series of closed-shop agreements with construction craft unions having "white only" clauses in their constitutions and by-laws.

[3] In its 1961 Report, the Commission found that a significant proportion of the nation's construction workers were covered by union collective bargaining agreements and that there was a uniform pattern of exclusion of black workers by such craft unions as the Iron Workers, Steamfitters, Plumbers, Electrical Workers, and Sheet Metal Workers. See, United States Commission on Civil Rights, Book 3, *Report on Employment,* 127-131 (1961).

In 1969-1970, the amicus NAACP participated under contract with the Department of Housing and Urban Development in conducting a survey of minority construction firms. See, *A Survey of Minority Construction Contractors,* U. S. Department of Housing and Urban Development, 1971. The survey disclosed that of 870,000 identifiable contracting firms in the U.S. construction industry, less than 8,000 were owned by minority group members and almost 70% of the predominantly black contractors had never performed any government financed work. *Id.* at 1, 8. The HUD survey concluded that, "it would be unrealistic to conclude that racial discrimination is not, overall, a formidable barrier for minority firms in the housing industry. The overt and subtle methods of discrimination can be assumed to be as influential there as elsewhere." *Id.* at 20.

The significance of the 1975 Report to Congress of the U.S. Commission on Civil Rights concerning minorities and women as government contractors is that it constituted both an announcement of the failure of earlier efforts to include these groups, as well as a clear call for additional and more productive measures.[4] See also, *United Steelworkers of America* v. *Weber,* 61 L.Ed.2d 480, 486 fn. 1 (1979) and the authorities cited therein regarding the thoroughly documented history of racial discrimination in the construction industry. By 1977, when Congress was considering a $4 billion expenditure to relieve the severely

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[4] In their transmittal letter to the President and the Congress, the members of the Commission wrote: "The three special Federal programs established to assist minority-owned firms have experienced limited success in increasing the number and dollar value of contracts awarded to these firms. . . . The Commission trusts that its findings and recommendations will prove helpful to the executive and legislative branches as they seek to structure programs that will be more responsive to the needs of minority firms and will provide new opportunities for non-minority, female-owned firms." *Report, supra* ii-iii.

depressed construction industry, it had already received a large amount of data through the years showing that blacks and other minorities, whose unemployment rates were geometric progressions of the white unemployment rate, would benefit little if at all unless special inclusive measures were undertaken. This knowledge fully explains why the brief comments of Reps. Mitchell, Conyers and Biaggi and Sen. Brooke in support of the amendment challenged here were undisputed and sufficient to document the purpose of the legislation.

C. *The Statute Meets the Strict Scrutiny Standard, Because It Is Narrowly Drawn to Accomplish the Compelling Legislative Purpose of Redressing Prior to Discrimination.*

In considering the constitutionality of the MBE set-aside amendment, both the Second Circuit below and the Third Circuit in *Constructors Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (1978), applied the traditional standard of review for race-based legislation—that of "strict scrutiny", concluding in both cases that the amendment passes constitutional muster. Under this standard, any legislation or official conduct that draws racial or ethnic distinctions is to be deemed inherently suspect and must be subject to strict scrutiny. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). In order to withstand a constitutional attack, the distinction drawn must serve a compelling government purpose and be the least restrictive means of achieving that purpose. *Regents of the University of California* v. *Bakke, supra* (Opinion of Justice Powell). In the courts below, the amendment was correctly found to indeed serve a compelling government interest through a means wholly appropriate to that end.

The basic purpose of the underlying legislation, growing out of and expanding the provisions of Title I of the Local Public Works Capital Development and Investment Act of

1976, P. L. 94-369, 90 Stat. 999-1012 (1976), was to provide massive federal relief to the construction industry. In 1977, with a doubling of the federal funding over the prior year's expenditures, it was known that the benefit of this aid would have little impact on soaring minority unemployment rates without some special inclusive feature. To a significant degree, it was also known that this enormous appropriation was being used to finance the private sector's historic patterns of racial exclusion from construction industry work. It was therefore not only a legitimate and compelling concern of Congress to include the most disadvantaged into the federal largesse, it was also a necessary measure to assist in disentangling the federal government from its role as foremost financier of private racial discrimination.

This Court has repeatedly recognized the special competence of a legislative body in enacting remedial measures involving the conscious use of race or ethnicity where it has been determined that racial exclusion has existed on a widespread basis in the past and would continue to exist without the imposition of affirmative remedial legislation. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977); *Bakke, supra* at 302, fn. 41; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The MBE set-aside amendment is particularly suited to the purpose of the legislation for it guarantees, *where possible*, that those who need the intended relief the most will receive a fair share of it. A decade of less dramatic affirmative attempts at including blacks and other minorities into the construction industry had simply not worked to an appreciable degree. The legislation permits reasonable exemptions, it allows federal contractors great flexibility in including MBE's into their bidding proposals, it allows

competitive bidding only among contractors who have included MBE's or obtained exemptions, and it does not require or result in the exclusion of any identifiable racial or ethnic group.

The ten percent figure for the minority set-aside is especially reasonable in view of the fact that blacks alone represent a higher percentage of the national population, coverage of other minorities bringing the minority population figure substantially higher. In the absence of a long history of discrimination against minorities in construction contracting, Congress could surely reasonably have concluded that their representation among government contractors would have been well above ten percent. See: *Weber, supra* 61 L.Ed.2d at 486.

Because this legislation was enacted by Congress to redress well-documented, extensive prior racial discrimination, and was narrowly tailored to meet that goal, it comes well within the scope of Congress' enactment power under Section 5 of the Fourteenth Amendment. This compelling purpose withstands even strict equal protection scrutiny. The decision below should therefore be affirmed.

II.

The Minority Set-Aside Provision Is Constitutional as Applied to Negroes as an Exercise of Congress' Power Under Section 2 of the Thirteenth Amendment to Eliminate the Badges and Incidents of Slavery.

A. *Congress Has the Long-Standing Power to Act to Eliminate the Badges and Incidents of Slavery.*

The minority set-aside clause, like any other duly enacted statute, is entitled to a presumption of constitutionality, *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U.S. 177, 195 (1938). This Court has held that if a constitutional basis can be found to uphold a law, it is "irrelevant whether this reasoning in fact underlay that legislative decision." *Flemming* v. *Nestor*, 363 U.S. 603, 612 *rehearing denied* 364 U.S. 854 (1960). Therefore the courts have a duty to search out a constitutional basis or bases to support Congressional action.

While the set-aside clause as applied to Negroes may find its basis in the "unique obligation" [*Morton* v. *Mancari*, 417 U.S. 535, 555 (1975)] of Congress toward Negroes arising, *inter alia*, out of their treatment under Article I, Sections 2 and 9, and Article IV, Section 2 of the Constitution, the Missouri Compromise and the Fugitive Slave Laws [See Justice Marshall's opinion in *Regents of the University of California* v. *Bakke, supra*], the legislation is clearly authorized under Section 2 of the Thirteenth Amendment. The Freedmen's Bureau legislation and other remedial measures enacted in the post-Civil War period pursuant to the Thirteenth Amendment are clear examples of Congressional action to provide public benefits specifically to Negro Americans where, on account of a history of past exclusion, they are not presently receiving those benefits.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court held that under Section 2 of the Thirteenth Amendment Congress had power to legislate against the acts of private individuals as well as those of states and to determine what steps were necessary to effectuate the terms of Section 1 of the Amendment. In so doing it stated:

> "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and to translate that determination into effective legislation." P. 440

The minority set-aside, like much of the Reconstruction era legislation, was an exercise of that authority.

B. *Congress Has Enacted Race-Conscious Affirmative Action Legislation as a Means of Eliminating the Badges and Incidents of Slavery.*

One of the most striking examples of legislation designed to fulfill the obligation to eliminate the effects of slavery through affirmative action is that establishing and extending the Freedmen's Bureau in the Civil War and immediate post-Civil War era. The Bureau was established in 1865 pursuant to war powers. The Bureau's legislative history clearly shows that it was intended to benefit newly freed slaves. Congressman Elliot, Chairman of the House Judiciary Committee, which reported S.60, a bill to extend and increase the authority of the bureau stated, in response to a question on the difference between "freedmen" and "refugees":

> "I suppose refugees to be those who are not freedmen; that is to say those who had not been in slavery. Colored refugees may be freedmen or they may not; but refugees may be white; and when the terms 'refugees' and 'freedmen' are used, I suppose the difference

> would be that the refugees are white." 71 *Cong. Globe* 516, 39th Cong., 1st Sess.

The reports of the freedmen's bureau indicate that although it did assist "loyal refugees" who were white, its principal concern was with blacks. This led to considerable opposition in Congress to continuation of the Bureau. See, for example, speeches of Senators Guthrie, Saulsbury, Johnson and Davis and Congressman Taylor against S. 60, 71 *Cong. Globe* 336, 362-3, 372-3, 396, 421, 544; 73 *Cong. Globe* 2780, 2362. See also President Johnson's veto messages on the two bills, labelling them class legislation that favored the freedmen over whites. 71 *Cong. Globe* 915-18; 75 *Cong Globe* 3850.

The first attempted extension of the bureau (S. 60), which passed Congress but was successfully vetoed by President Johnson, and the successful one (H.R. 613), 14 Stat. 173, passed in 1866 over his veto, were race specific. Some sections of the extension statute applied to freedmen only. Section 6 confirmed land grants in South Carolina made to "heads of families of the African race." Section 7 authorized disposition of certain lands to persons who had been dispossessed from the land occupied under a war time field order of General Sherman. The only persons who would qualify were Negroes. Congress was aware of this, as Senator Trumbull had referred to a similar provision in S.60, which he authored:

> "Major General Sherman in his order states that certain lands would be set apart for the benefit of freedmen . . . There are some forty or fifty thousand [N]egroes upon those lands." 71 *Cong. Globe* 299, 39th Cong. 1st Sess.

Section 13 of the law provided that the Commissioner of the bureau should cooperate with private benevolent associ-

ations of citizens in the field of education in aid of freedmen by providing buildings to be used for their education.

When legislation was passed to start phasing out the bureau's operation, this educational affirmative action by the federal government was continued by Congress. Under 15 Stat. 83, the bureau was continued but the Secretary of War was authorized and directed to discontinue its general operations in any state that had reestablished its relationship with the United States and whose representatives had been seated in Congress. However, the bureau's educational activities were to be continued until the states had made suitable provision for the education of the children of freedmen, and the Commissioner was authorized to use unexpended funds for the education of freedmen.

Literally thousands of school for blacks were opened and operated with the assistance of the bureau. One observer stated that at the beginning of 1886 there were 4,000 operating with its help. Dyson, W., *Founding of Howard University, Howard University Studies in History #1,* 22 (1921). In November 1867, the Commissioner of the Bureau reported that the assisted schools had reached the most remote counties of each of the Confederate states. He further reported there was at least one college or normal school operating in each of these states for the education of freedmen. Among those assisted were Atlanta, Fisk, Wilberforce and Lincoln Universities and Storer College. Peirce P., *The Freedmen's Bureau,* 77-8 (1971). When the Bureau ceased operations, it turned over 50 buildings to religious and philanthropic organizations in South Carolina alone to be used for the education of the freedmen. Abbott, M., *"The Freedmen's Bureau and Negro Schooling in South Carolina," The South Carolina Historical Magazine,* Vol. LVII, No. 2, 69 (1956). This was pursuant to 15 Stat. 83.

Congress passed other legislation that was of exclusive benefit to blacks in the post-Civil War period. 14 Stat. 367 limited the fees that agents or attorneys could charge "colored soldiers' for assistance in collecting pension benefits and otherwise protected them from being bilked. 15 Stat. 20 appropriated federal funds for the relief of "freedmen and destitute colored people in the District of Columbia." 16 Stat. 8 authorized continuation of "the freedmen's hospitals in Richmond, Virginia; Vicksburg, Mississippi; and in the District of Columbia." This last continued in operation with federal assistance until it was merged, pursuant to legislation passed in 1961, with Howard University, 75 Stat. 542, P.L. 87-262.

Legislation establishing the Freedmen's Bureau and related measures was founded on the Thirteenth rather than the Fourteenth Amendment. It was passed by Congress at a time when the 14th Amendment was two years from ratification, but after the 13th Amendment had been ratified.

The sponsor of H.R. 613, Representative Eliot, noted that the previous Congressional legislation for the bureau had been enacted prior to the adoption of the 13th Amendment and therefore did not apply to those freed by the amendment but only to those previously free or freed by military action. 73 *Cong. Globe* 2772, 39thCong., 1st Sess. The establishment of the bureau was based on the war powers, but its continuation and expansion were based on the 13th Amendment.

Senator Trumbull, the author of S. 60 and Chairman of the Judiciary Committee that had reported out both S. 60 and the 13th Amendment, also was on record that his bill was based on this amendment:

> "I reported from the Judiciary Committee the second section of the constitutional amendment for the very

purpose of conferring upon Congress authority to see that the first section was carried out in good faith, and for none other; and I hold that under the second section Congress will have the authority, when the constitutional amendment is adopted, not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights. We may, if deemed advisable, continue the Freedmen's Bureau, clothe it with additional powers, and if necessary back it up with a military force, to see that the rights of the men made free by the first clause of the constitutional amendment are protected." 71 *Cong. Globe* 43, 39th Cong., 1st Sess.

Later in debate he stated:

"I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. If we believe a Freedmen's Bureau necessary, if we believe an act punishing any man who deprives a colored person of any civil rights on account of his color necessary—if that is one means to secure his freedom, we have the constitutional right to adopt it." 71 *Cong. Globe* 322.

Speaking in opposition to S.60, Senator Stewart acknowledged the basis for the bill:

"The Senator from Illinois has introduced two bills [S.60 & S.61] . . . under the [13th] constitutional amendment." 71 *Cong. Globe* 298.

Speaking on the bill, Senator Fessenden, although stressing the war power as the bill's constitutional base, noted also the 13th Amendment as supporting it:

"I might go further, and say that if everything else failed I might even perhaps agree with my friend, the honorable Chairman of the Committee on the Judiciary, that under the second provision of the constitutional amendment, giving power to enforce the previous provision granting the freedom of the [N]egro, we might do all that we judged essential in order to secure him in that liberty the enjoyment of which we have conferred upon him." 71 *Cong. Globe* 366.

Congress, in passing the laws extending the Freedmen's Bureau and otherwise providing for freedmen and their descendants, asserted its authority and intent to act affirmatively under Section 2 of the 13th Amendment to eliminate the badges and the incidents of slavery. The work in the area of affirmative action on behalf of the freedmen begun by the 39th Congress did not end with the termination of Reconstruction. There are at least two examples (now merged) of its continuation to 1979. The first was the continuation of Freedmen's Hospital in the nation's capital. The second is Howard University. That institution was chartered by Congress in 1867. It was assisted in acquiring land and in becoming organized by the Freedmen's Bureau. From that time until the present it has received continuing federal assistance. In its first hundred years, this amounted to $215,204,392.00 in operating and construction funds. Logan R., *Howard University —The First Hundred Years,* App. B, Tables I and II (1969).

Although the university was founded as an integrated institution, the assistance of the Freedmen's Bureau was contingent on Howard's making special provision for the freedmen. This condition is in the deeds transferring title of the buildings built by the bureau to the university. Holt, T., C. Smith-Parker and R. Terborg-Penn, *A Special Mission: The Story of Freedmen's Hospital,* 1862-1962, 11 (1975). Since its very early years it has fulfilled that mission and its student body has been and is predominently black.

In extending assistance to the university and to Freedmen's Hospital through the years, Congress has been aware of the nature of the special consideration given the descendants of freedmen. This was emphasized at the hearings on the bill merging them, passed in the 87th Congress. The then Secretary of the Department of Health, Education and Welfare, Abraham Ribicoff, in testifying before the Congressional Committee considering the bill, stated it was the administration's purpose to assist the university to promote excellence while "keeping its doors open to young people who have been handicapped economically and educationally *by the happenstance of race.*" (Emphasis added.) Hearings, House Committee on Education and Labor, 87th Congress, 1st Sess., on H.R. 6302, 62 (1961). Senator Ribicoff also noted the origins of Freedmen's Hospital and its role in caring for the "Negro war refugees and 'freedmen' who flocked to Washington in the 1860's," and that it was the one freedmen's hospital that was continued by annual Congressional appropriations.

Thus, beginning with the passage of the Freedman's Bureau Act of 1866, there has been a continuous pattern of support by Congress under the 13th Amendment for institutions founded and extended for the purpose of aiding ex-slaves and their descendants to throw off the badges and incidents of slavery.

C. *Congress Has Determined That One of the Badges and/or Incidents of Slavery Is the Limitations Placed on the Right to Contract.*

When Congress passed the Civil Rights Act, R.S. 1777; 16 Stat. 144, it determined that one of the badges and incidents of slavery was the limitation placed on the right of blacks to enter into and enforce contracts. Accordingly it reaffirmed that all citizens should have "the same right to make and enforce contracts . . . as is enjoyed by white citizens" 42 U.S.C. §1981. This Court, in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), upheld Congress' right under the 13th Amendment to legislate to protect the right of blacks to contract, as it had upheld protection of their property rights in *Jones* v. *Mayer, supra.* See extensive discussion of the legislative history in *Jones* v. *Mayer, supra,* 392 U.S. at 422-437, which demonstrates that interference with the rights of blacks to make and enforce contracts was a key purpose behind the enactment of the Thirteenth Amendment and the enactment of Section 1 of the Civil Rights Acts of 1866, the predecessor version of 42 U.S.C. Section 1981.

The legislation herein under attack comes within the heart of the purpose of the Thirteenth Amendment. This statute, like Section 1981, is aimed at remedying historical disadvantages imposed on minorities' right to contract. Once Congress determined that the right to enter into contracts was a right that was abridged by the "peculiar institution" of slavery, it had the power "to translate that determination into effective legislation." *Jones* v. *Mayer, supra,* 392 U.S. at 442.

Effectuating an unrealized objective of the Thirteenth Amendment provides a compelling purpose for this narrowly drawn statutory provision. The decision below must be affirmed because the Thirteenth, as well as the Fourteenth Amendment, supports the legislative enactment.

CONCLUSION

Because the statute is an appropriate exercise of Congressional power under both the Thirteenth and Fourteenth Amendments, it survives any level of equal protection scrutiny. Amici therefore respectfully urge this Court to affirm the decision of the Court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners,*

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, et al., *Respondents.*

BRIEF OF AMICI CURIAE MEXICAN AMERICAN/HISPANIC CONTRACTORS AND TRUCKERS ASSOCIATION, INC., LEAGUE OF UNITED LATIN AMERICAN CITIZENS, AMERICAN G.I. FORUM, INCORPORATED MEXICAN AMERICAN GOVERNMENT EMPLOYEES

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CONSENT OF PARTIES

The letters of Petitioners and Respondents consenting to the filing of this brief amicus curiae have been filed with the Clerk of the Court pursuant to Rule 42 (2), Rules of the Supreme Court of the United States. Amici file this brief on the merits in support of the position of the Respondents to this action.

INTEREST OF AMICI CURIAE

The Mexican American/Hispanic Contractors and Truckers Association, Inc., is a non-profit organization located near San Francisco, California. It is a successor to the former Mission Contractors Association. The membership is composed of over forty Mexican American and other Hispanic firms which seek to provide various technical, administrative, and affirmative action information services to its members and other Hispanic firms in Northern California. Members of the Association have been awarded contracts under the minority set-aside provision for local public works projects under review in this case.

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social, economic,

and cultural functions. Its 50th anniversary year, 1979, continues the development of an equitable share of economic and employment opportunities for Hispanics. LULAC has been responsible for the formation of Operation SER, the largest Hispanic training program in the country.

The Incorporated Mexican American Government Employees (IMAGE) is a national organization concerned with the public employment of Hispanic Americans, Mexican Americans, Cuban Americans, Puerto Ricans, Central-South Americans, and all those of Hispanic cultural/linguistic heritage. With close to 70 affiliates chartered in 24 states, IMAGE is incorporated in the District of Columbia. IMAGE was created because of the substantial underrepresentation of Hispanics in federal, state

and local employment, including governmental contracting. For example, although Hispanic Americans comprise over 7% of the national population, they hold 3.5% of the 2.4 million federal jobs, 2.4% of the 1.5 million state jobs, and 4.1% of the 2.5 million local/municipal jobs.

The American G. I. Forum is a veteran's family organization composed primarily of Mexican Americans. It had its beginnings after World War II in the aspirations of returning Mexican American veterans to end the discriminatory social, economic and political discrimination against Mexican Americans. One of the main goals of the Forum is the improvement of employment and economic opportunities for Mexican Americans.

QUESTIONS PRESENTED

1. Whether the provision of the Public Works Employment Act of 1977 which sets aside ten percent of those federal funds for minority business enterprises is constitutional.

2. Whether the provision of the Public Works Employment Act of 1977 which sets aside ten percent of those federal funds for minority business enterprises is in violation of Title VI.

STATEMENT OF THE CASE

Amici defer to the parties to describe the factual setting of this case.

SUMMARY OF ARGUMENT

There is a compelling government interest served by the classification made in the set-aside provision of the Public Works Employment Act (PWEA).

Recent congressional history, the legislative history of the amendment of the PWEA to benefit minority business enterprises, and the unmistakeable purpose of the provision itself, demonstrate that the set-aside provision was intended to remedy the effect of past discrimination.

In view of information which was known to Congress, the classification established by the set-aside provision represents a necessary means of overcoming racial discrimination. Previous efforts to deal with racial discrimination against minority businesses have proved to be inadquate, and Congress is justified in the adoption of more stringent measures to redress the perceived discrimination.

ARGUMENT

I.

THE REQUIREMENT THAT TEN PERCENT OF FEDERAL GRANTS FOR LOCAL PUBLIC WORKS PROJECTS BE SET ASIDE FOR MINORITY BUSINESS ENTERPRISES IS A CONSTITUTIONALLY PERMITTED REMEDY FOR DISCRIMINATION.

There is no dispute that statutory and constitutional provisions protect all races from racial discrimination. McDonald v. Santa Fe Trail Tranp. Co., 427 U.S. 273 (1976). However, where minorities have been victims of discrimination, this court has recognized that racial classifications are permissible to provide redress. Franks v. Bowman Transp. Co., 424 U. S. 424 U.S. 747 (1976), Regents of the University of California v. Bakke, 438 U.S. 265 (1978), United Jewish Organizations v. Carey 430 U.S. 144 (1977).

And even though efforts to redress

discrimination involve the setting of numerical goals, such efforts are permissible in certain circumstances. United Steelworkers v. Weber, 47 U.S.L.W. 4851 (1979).

While courts are obliged to review racial classifications under the standard of "strict scrutiny," Loving v. Virgina, 388 U.S. 1 (1967), Dunn v. Blumstein, 405 U.S. 330 (1972), Korematsu v. United States, 323 U.S. 214 (1944) the validity of a statute using such classifications will be upheld if there is a compelling governmental interest advanced by that classification, Regents of the University of California v. Bakke, supra, and if it is tailored to meet its legitimate objectives. Dunn v. Blumstein, 405 U.S. 330 (1972).

A.

A COMPELLING STATE INTEREST IS SERVED BY THE SET ASIDE REQUIREMENTS

Petitioners claim that the legislative history is not clear as to the intent of Congress in accepting the amendment. However, where the legislative history is ambiguous, the statute itself may be examined to find the legislative intent. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, on remand 335 F. Supp. 873, supplemented 357 F. Supp. 846, reversed 494 F.2d 1212, cert. denied, 421 U.S. 991 (1971). An examination of the statute itself led the Court of Appeals to the conclusion that the purpose of the statute was "self-evident" and it was "beyond dispute" that it was intended to remedy past discrimination. Kreps, supra, at 604.

Like the plan in Weber, supra, the Set-Aside provision is "designed to break down old patterns of racial balance." Weber, at 4855. On its face, the provision rebuts any inference that it is designed to maintain a racial balance. Indeed, were this provision designed to maintain a racial balance, the percentage set-aside would have to be much higher, to reflect the proportion of the named minorities in the population, and would probably be adjusted regionally according to the number of minorities present.

That congressional intent was to "break down old patterns" which entrenched or resulted in discrimination is made clear by recent congressional history, which has included numerous anti-discrimination laws, many of which were noted by the Court of Appeals, and by the

legislative history of the set-aside provisions. Congress is empowered to take affirmative steps to prevent the use of public funds in any fashion which entrenches racial discrimination, Lau v. Nichols, 414 U.S. 563 (1974) and has taken such steps in the legislation now being challenged.

"It is, perhaps, axiomatic that the main thrust of federal statutes which were enacted to deal with various forms of discrimination on account of race, color, national origin, sex and religion, was toward rectifying the continuing effect of discrimination practiced against historically disadvantaged minorities." Sex Discrimination in Employment, 26 ALR Fed. 13, p.28. Certainly, the Civil Rights Act of 1964, was directed towards the elimination of discrimination

In Weber, this court held that the Legislative history plainly showed that Title VII was enacted because of the economic plight of Blacks.

> "It was clear to Congress that the crux of the problem [was] to open employment opportunities for Negroes in occupations which have traditionally been closed to them. (Citation omitted), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." Weber, at 4854.

Congressional findings of discrimination against minorities have also resulted in legislation such as the Small Business Act, which evidences a Congressional determination that full participation in the business sector by all groups, including those who have been socially or economically disadvantaged, is essential. However, Congress, in the 8(a)

program of the Small Business Act, 15 U.S.C. §637(a), specifically found that "...many persons are socially or economically disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances". (emphasis added). H.R. Rep. No. 95-1714, 95th Cong., 2nd Sess. (1958).

The Court below properly considered congressional history over the past decade and a half to be relevant in determining the intent of Congress in enacting the set-aside provision, and concluded that "any purpose Congress might have had other than to mredy the effects of past discrimination is difficult to imagine" Fullilove v. Kreps, 584 F.2d 600, (2d Cir., 1978), at 605.

The Circuit Court below took note of the argument that "where an objective

can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary. A fortiori, where an objective does not need to be inferred, but instead has been made unmistakeably clear by a series of legislative enactments which manifest a common aim, it is unnecessary to search for or require an explicit statement of purpose in each individual piece of legislation which furthers that objective.

Although the set-aside provision was not originally included in the Public Works Employment Act, but was introduced on the floor as an amendment, any characterization of this amendment as an afterthought designed strictly to give minorities a share of federal contracts is appropriate. If the amendment

involves an element of afterthought, it is that of the Congress as a whole, which had failed to take adequate measures against the contribution by the federal government to the entrenchment of discrimination in the construction industry, but upon having that called to its attention, included that provision to effectuate the legislative purpose.

The Court of appeals was also correct in considering the remarks of the amendment's sponsor, and not conveniently disposing of them as "mere debate rhetoric," as did the Court in Associated General Contractors of California v. Secretary of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), vacated and remanded, 438 U.S. 909 on remand 459 F. Supp. 766 (C.D. Cal. 1978) appeal docket sub. nom. Armistead v. Associated General Contractors of Cali-

fornia, 47 U.S.L.W. 3563 (Jan.15,1979).

The remarks of Representative Mitchell clearly show that the amendment was intended to supplement other congressional efforts to overcome the handicap faced by minority business enterprises.

> "The average percentage of minority contracts, of all government contracts, in any given fiscal year, is one percent-1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entitities in our system but then on the other hand we say no, they are cut off from contracts."

Representative Mitchell saw his amendment as "an excellent opportunity to begin to remedy" the shortcomings of those prior congressional acts. 123 Cong. Rec.H.1437 (daily ed.Feb.24,1977), re-

printed in Associated General Contractors v. Secretary of Commerce, 441 F. Supp. 955, 997-1006 (C.D.Cal, 1977)

Inasmuch as the remarks were made by the person responsible for drafting the amendment, a great deal of weight must be given to that person's understanding of the intent of the provision. Brennan v. Corning Glass Works 480 F.2d 1254 (3rd Cir., 1973), reversed 94 S.Ct. 2223, 417 U.S. 188.

Representative Conyers, in his remarks, supports the conclusions that the amendment was remedial in nature, as he pointed out that

> "minority enterprises usually lose out...," and that "many other Members [of Congress] have had the same dismaying experience of trying to give solace to small businessmen who through no fault of their own simply have not been able to get their foot in the door." (emphasis added)

And it is not only the remarks of the amendment's sponsor and Representative Conyers that demonstrate congressional intent. Congressman Biaggi's remarks illustrate that the amendment was not intended to create arbitrary preferences, but to prevent continuation of discrimination inequities.

> "The objectives of this legislation [the Public Works Act] are both necessary and admirable. Yet without adoption of this amendment, this legislation may be potentially inquitable to minority businesses and workers."(emphasis added)

These remarks demonstrate an intent to effectuate congressional policy, as stated in the Sectional Analysis of Title VI, that discrimination "shall not occur" in connection with programs receiving Federal financial assistance. Sectional Analysis of Title VI, 1964 U.S. Code

Cong. & Admin. News, p.2400. It is submitted that in order to ensure that discrimination "does not occur", more than its prohibition is required. Provisions such as the ten percent set-aside, designed to eradicate existing and continuing discrimination, are necessary to ensure that it "does not occur" with the aid of federal funds. To do less than this would be to allow public funds to be spent in a "fashion which...results in racial discrimination". Lau v. Nichols, 414 U.S. 563 (1974) The clear objective of the set-aside provision, i.e., to prevent the discriminatory exclusion of minorities from government contracts, allows no conclusion other than that Congress sought to keep public funds from being used to contribute to racial discrimination, not to establish racial

eligibility for those funds.

In United Jewish Organization v. Carey, 430 U.S. 144 (1977) this Court found constitutional stringent congressional measures that permitted the use of racial criteria to eliminate the possibility of discrimination, after Congress became "dissatisfied" with its earlier, less stringent approach. The legislative history of the set-aside provision can be read as a determination by Congress that results of prior efforts, such as the SBA 8(a) program, were deficient, having resulted in only 1% of federal contracts going to minorities, and that stronger measures were called for to uproot discrimination which was firmly entrenched.

Quoting part of the House Report accompanying the Civil Rights Act of 1964 for the proposition that Congress did not

intend to prohibit affirmative action efforts, the Court in Weber necessarily included a portion of the report stating that Congress viewed "national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems" as being a catalyst for voluntary efforts by others. The set-aside provision, in furtherance of the Federal role which Congress envisioned, represents one attepmt to exercise "national leadership" toward the elimination of discrimination.

In Albemarle Paper Co., v. Moody, 422 U.S. 405 (1975), this court called upon employers to evaluate their practices and "to endeavor to eliminate" vestiges of discrimination. It is apparent that, with the set-aside provision of the Public Works Act, Congress has also

evaluated its own practices and is attempting to eliminate federal complicity in discrimination against minorities. The compelling governmental interest is so doing is self-evident.

B.
THE SET ASIDE PROVISION OF THE PUBLIC WORKS ACT IS PROPERLY TAILORED TO SERVE A LEGITIMATE OBJECTIVE

Where a compelling government interest in a racial classification is present because of the necessity of providing a remedy for past or present discrimination, the remedy designed is properly tailored when it is a necessary means of overcoming that discrimination. Dunn v. Blumstein, 405 U. S. 330, at 342 (1972).

Lesser measures, although they may be facially neutral, but that constitute ineffective remedies for the discrimination would not be properly tailored to meet the problem that Congress was addressing. The Constitution does not require that the government choose an inadequate means to achieve its aims, Storer v. Brown, 415 U.S. 724 (1974), nor is there any sound reason why Congress may not choose

multiple means to address a problem of tremendous proportions.

From the start the prospective minority businessmen faces disadvantages. With few exceptions, the route to entrepeneurship as a general or specialty contractor begins with entry into a skilled occupation. However, the historical exclusion of minority workers from skilled occupations has impeded the development of a skilled labor force in proportion to the minority population and consequently has also impeded the development of entrepeneurial ventures by minority group members. A Survey of Minority Construction Contractors, U. S. Dep't. of Housing & Urban Development (1970).

The study of minority memberships in the building trade locals is particularly pertinent to this case because of the

clear pattern of historical exclusion it represents, Herbert Hammerman, Minority Workers in Construction Referral Unions, MONTHLY LABOR REV. May 1972, at 21; cited at U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunities in Referral Unions (1976). Based on data from all individual building trade locals that reported to the EEOC in 1969, the report noted that persons of Spanish origin constituted less than one percent of membership of 77 percent of all reporting locals in the mechanical trades (boilerworkers, electrical workers, elevator constructors, iron workers, plumbers and pipefitters, and sheetmetal workers). In fact, 58 percent of all locals reporting had no members of Spanish origin with another 19 percent reporting less than 1 percent of membership as

Spanish origin. This pattern was lower than Spanish origin membership in the laborers', roofers', brick laborers' and plasterers' unions.

The summary of the report data indicates the Congress was well informed of the plight of minority workers in the building trade unions as reported in U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1976).

The majority of small businesses, according to a 1972 survey, are one person operations that account for a small percentage of the gross receipts. U. S. Dep't. of Commerce, Social and Economic Statistics Administration, Bureau of the Census, 1972 Survey of Minority Owned Business Enterprises, April 1975.

This contrasts starkly with the findings reported by the EEOC in Houston, Texas — "The employment data led the Commission to conclude that the minority workers' share of company employment declines as the size of the company's work force rises." Equal Employment Opportunity Commission, An Equal Opportunity Report: Hearings on Causes of Unequal Opportunity (1970).

In 1972, the three-fourths of the firms that had no paid employees had only slightly more than one-fourth of the gross receipts by Hispanic owned businesses. The bulk of the receipts, nearly three-fourths, were made by the one-fourth of all the firms owned by Spanish origin businessmen with paid employees. On the average, the one-fourth of Hispanic businesses which have paid employees

hired only six people, indicating operations only slightly more sophisticated than those with no paid employees. As the Minority Construction Contractors Survey stated, these businesses have remained "small and marginal."

As bleak as these facts are, they are improved in part by the inclusion of Hispanics of Cuban origin in the statistics.

> The Cuban immigration, unlike that of Mexicans or Puerto Ricans, was politically, rather than economically, motivated. Although a small Cuban community had long been established in Southern Florida, by far the largest flow of immigrants came about as a result of the 1959 revolution.
>
> For the most part, the Cuban refugee was a middleclass white-collar worker or a skilled or semiskilled blue-collar

> worker-person who most likely had been economically successful prior to immigration. Newman, Profile of Hispanic Workers, in U. S. Work Force, 101 Monthly Labor Rev. 3 (Dec. 1978).

Since the Cubans had the exposure, afforded to them in their country, to skills needed by the entrepeneur, their businesses did substantially better than the average Hispanic-owned business. The average receipt per firm in 1972 for Minority business of Spanish origin was 144,000 dollars. In the state of Florida, with the Cuban population constituting more than 60% of the total Hispanic population, the average gross receipts per firm were $241,000. The Cuban-owned small business fared even better, with gross receipts of $337,000 or 134% higher than the average of $144,000. Minority

owned business of Spanish origin hired an average of six employees, but Cubans hired on the average ten employees, four more than the average. 1972 Survey of Minority-Owned Business Enterprises, supra. The greater success of Cubans in business, however, also correlates with a lower unemployment rate. According to the December, 1978 issue of the Monthly Labor Review, the Cuban unemployment rate of 8.8% was significantly lower than the 13.6% rate for Puerto Ricans, 10.1% for Mexican Americans, and 13.9% for Blacks.

According to the Minority Construction Contractors Survey, supra, most minority-owned contracting firms are small operations, caught up in a cycle of problems that confine them to small jobs, usually subcontracts; they are limited in their ability to obtain information, financing, training, personnel or management assistance, or to secure jobs on a competitive basis.

The Survey states that:

> 'Minority firms generally lack experience. Without the opportunity and administrative expertise on large jobs, minority contractors typically remain small and marginal.'
>
> '. . .minority contractors generally seem to suffer not only from racial discrimination but lack of money, contracts and management capabilities - the prerequisites for success in any business.' (emphasis added)
>
> '. . .access to financing was a primary obstacle to minority contractors operations." A Survey of Minority Construction Contractors: Published by the Office of the Assistance Secretary for Equal Opportunity. U.S. Department of Housing and Urban Development.'

It cannot be seriously disputed that past discrimination against minorities

has denied them access to the skilled professions, and this lack of access to professional training has seriously hampered them in the establishment of successful contruction firms. The most recent data available to Amici indicates that despite the governmental, private, employer, and labor efforts, the Hispanic construction contractors remain small and underdeveloped. For example, of the 100 largest Hispanic firms in terms of 1978 Gross Sales, the largest construction firm (Ranked 34) did only 7.5 million dollars worth of sales and employed only 150 employees. Nuestro's First Annual List of the Largest Companies Owned by Latinos and Based in the United States - Ranked According to 1978 Sales, Nuestro, January, 1979.

The Report on Minorities and Women

as Government Contractors, supra, concluded that the attitudes of federal contracting specialists was a crucial factor in the award of contracts; it pointed out at p. 20:

> Considerably less restraint was exercised in comments on minority firms. The nature and intensity of remarks by several contracting specialists against minority firms, generally, and socioeconomic programs left little doubt that their attitudes toward female-owned firms might be similarly biased. Statements made by several contracting officers indicate that they may not exercise their discretion in favor of minority businesses in evaluating the capabilities of prospective contractors. Since contracting officers have a great deal of latitude in the evaluation of bids submitted by construction firms, as well as in the preaward surveys of manufacturing firms, nonprofessional organizations, and service organizations, their baises may surface at this point.

Thus, Congress had substantial experience with prior programs and efforts to conclude that in the area of federal contracting the institutional biases and prejudices were a major impediment to minority contractors. Consequently, a program designed to overcome such problems should be viewed as a necessary means of overcoming that discrimination.

Such facts notwithstanding, Petitioners regard a prohibition on discrimination as sufficient, forgetting the experiences that minorities have had whenever action to back up the prohibitions was not forthcoming. Brown v. Board of Education, 349 U.S. 294 (1955), calling for an end to segregation "with all deliberate speed" remained for many years a skeletal victory which had to await the failure of voluntary compliance efforts,

for which many years were allowed, before government was willing to move affirmatively to begin integration. With the set-aside provision, Congress has made an affirmative move to eliminate discrimination in the construction industry, and has tailored the relief as precisely as the discrimination which precipitated its necessity.

In Pettway v. American Cast Iron Pipe Company, 494 F. 2d 211 (5th Cir. 1974) the court was faced with the task of calculating a classwide back pay award. The court acknowledged the "impossibility of calculating the precise amount of back pay" for each class member, since the process of determining the employment progression involved a "quagmire of hypothetical judgments." However, the Court nevertheless held that, in spite

of the problems and possible inequities, back pay would be awarded, as in fashioning a remedy, "unrealistic exactitude is not required."

Similarly, in the instant case, while Congress' means of remedying past discrimination in federally funded programs involves possible inequitities or windfalls, a more precise classification is not possible. Congress did, however, use what exactitude can be realistically expected and that is all that can be required.

Although the issue of determining who qualifies as a member of one of the enumerated groups may not be capable of an absolutely precise definition,the staute makes no attempt to precisely apportion benefits according to percentage of population. It attempts only to afford a measure of relief to groups who have been

victimized by discrimination.

The use of only facially neutral assistance criteria in the face of non-neutral disadvantages would serve only to perpetuate and entrench existing discrimination. To simply announce a ban on discrimination and calling for unspecified efforts to correct its effects is inadequate. It is well within Congressional authority to monitor and measure the effects of such prohibitions and to require stronger corrective measures upon the demonstrated failure of weaker ones. By the enactment of the set-aside provision, Congress was requiring stronger measures where lesser pressure had proved insufficient, in an effort to dismantle the existing systems which had the effect of perpetuating discrimination. Although these greater

measures take the form of a numerical percentage of federal funds, "numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality." Southern Illinois Builders Assn. v. Ogilvie, 471 F. 2d 680 (7th Cir. 1972) at 686.

The 8(a) program, 15 U.S.C. 637(a), of the Small Business Act represents a Congressional effort to assure that disadvantaged small businesses, primarily minority, were awarded a reasonable amount of contracts by federal agencies.

The contracts awarded through the 8(a) program increased from 8 contracts valued at nearly $10.5 million in FY 1968 to 1,720 contracts amount to more than $153 million in FY 1972 ($215.6 million

in FY 1973 and $271.1 million in FY 1974). The 8(a) contracts thus account for a major portion of all federal contracts awarded to minority firms. Yet they represented only a minute fraction, about .27 percent of the total federal procurement of $57.5 billion in FY 1972. *

The analysis of the 8(a) program concluded there was a specific lack of progress in construction contracting:

> A detailed analysis of 8(a) contracts awarded by GSA provides a case study of the characteristics of the program's contracting. (See Appendix C). It shows that, despite several large manufacturing contracts, most 8(a) contracts were low in value and awarded in the less promising services and small construction industries.

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* United States Commission on Civil Rights, Minorities and Women as Government Contractors, May 1975.

> The failure of the program thus far to emphasize manufacturing and general construction contracting undermines its potential for assisting in the development of minority firms in these industrial areas. (Emphasis added). *

The minority subcontracting program, 41 C.F.R. 1-1.1310-1, is based on a requirement that certain federal contracts include clauses directing federal prime contractors to attempt to utilize minority subcontractors. The purpose is to implement the announced federal policy of creating opportunities for the participation of minority firms in government procurement. This aspect of the program attempts to utilize "best efforts" for contracts under $500,000 and "substantial contracting opportunities" when over

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* Id. at p. 44.

that amount.

Nine of the ten federal agencies surveyed by the Commission reported they had not established systems to collect relevant and reliable information on minority subcontracting. Furthermore, statistics were not available to indicate the impact of the program, but the Commission concluded the program failed to substantially increase either the numbers of dollar amounts of subcontracts awarded to minority firms. Minorities and Women as Government Contractors, supra at 79.

The impact of the limitations and difficulties inherent in obtaining voluntary compliance with "best efforts" and "substantial compliance" in minority contracting efforts fully justified the conclusion of Congress that alternative methods were required if the problem was

going to be overcome.

Past experience with statutory set-aside programs established a proper basis for Congress to conclude that minority firms were unable to compete effectively with small but well-established white male firms that can frequently afford to underbid a new minority or female firm. * Minorities and Women as Government Contractors, supra, at 29, 102-104. Thus the minority contractor designation under the set-aside in this case was based on the failure of the past programs to reach

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* Small Business Set-Aside, 41 C.F.R. Sec. 1-1.702 (b); Labor Surplus Set-Aside Contract, 29 C.F.R., Sec. 8; Additional information was available from State and Local Set-Asides under Illinois Small Business Purchasing Act, Illinois Revised Statutes, Ch. 122, Sec. 132.21; and Denver City Charter, Sec. 161.3 as amended by Ordinance 319, adopted July 23, 1970.

minority contractors under programs that had no specific minority set-aside provisions.

In a study done for the Colorado Civil Rights Commission under the auspices of the U. S. Equal Employment Opportunity Commission, the conclusion was reached that despite Executive Orders since 1941 prohibiting discrimination in firms that serve as government contractors, these firms in 1966 had employment records no better than other employers:

> "Following such a long period of governmental efforts, it would be a reasonable expectation to find that employers who were subject to the Office of Federal Contract Compliance in 1966 should be distinguished readily by the improved work opportunities minority workers have with them as contrasted with other employers. Unfortunately, this is not the case.

> 'Not in a single instance have minorities gained a higher percentage of the white-collar jobs with prime contractors than with employers who have no government contracts.' Schmidt, Spanish Surnamed American Employment in the Southwest, at 35.

It would indeed be tragic if constitutional and statutory provisions designed to end discrimination were interpreted as prohibiting steps to eliminate that discrimination. Petitioners' argument that there is a less restrictive way than numerical formulas or racial classifications to address the problem of discrimination against the minority entrepeneur is to argue that Congress should be limited to approaches which were demonstrated to be ineffective.

An inescapable fact is that because the discrimination prohibited by the

Constitution is based on racial classifications, "corrective action under it must do the same." United Jewish Organizations of Williamsburg v. Wilson, 510 F. 2d 512 (2nd Cir. 1975). Congress clearly determined, in these circumstances, that the classification used was necessary to effectuate the purpose of the legislation.

II.
THE SET ASIDE PROVISION OF THE PUBLIC WORKS ACT DOES NOT VIOLATE TITLE VI

A majority of the Court in Bakke found that the Title VI anti-discrimination provisions prohibited only those racial classifications that violate the Constitution. 438 U.S. at 287, 328.

It therefore follows that since the set-aside provision is constitutional, that provision does not constitute a violation of Title VI. Fullilove v. Kreps, 584 F. 2d 600 (2nd Cir. 1978).

Moreover, since Title VI is a remedial statute, it must be read in a manner which effectuates rather than frustrates the major purpose of the law. Equal Employment Opportunity Commission v. Louisville & Nashville Railroad Company, 505 F. 2d 610 (5th Cir. 1974); Tcherepin v. Knight, 389 U.S. 332 (1967).

It would certainly frustrate the major purpose of Title VI to hold that it does not permit steps to eliminate racial discrimination.

It is apparent that there is an increasing use of affirmative action programs on the legislative, judicial, and administrative levels. It has been recognized that evolving Congressional patterns may point out the intent of earlier statutes, City of Burlington v. Turner, 336 F. Supp. 594 (D.C. Iowa, 1972), and in this case the patterns point to the intent of Title VI as not prohibiting racial classifications to remedy past discrimination.

It has been the ruling of this Court that administrative interpretations of a statute by the enforcing agency is entitled to "great deference." Griggs v.

Duke Power Co., 401 U. S. 424 (1971). The congressional view that the set-aside provision was compatible with Title VI, as is demonstrated by the enactment of the set-aside long after Title VI became a strong factor in many programs, is entitled to similar deference.

CONCLUSION

Information available and known to Congress, and the actions of Congress based on that information, provide a sufficient basis to support both the necessity for and the reasonableness of the ten percent set-aside.

The judgment of the Court below should in all respects be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERALD N. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF AMICUS CURIAE OF NATIONAL CONFERENCE OF BLACK MAYORS, INC.

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I. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) provides:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al.,
Appellants,

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,
Respondents.

AMICUS CURIAE BRIEF

The National Conference of Black Mayors, Inc., with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

III. THE CONSTITUTIONAL AND LEGAL ISSUES PRESENTED

This Court is called upon to decide herein two issues:

A. Whether the requirement contained in Section 103(f)(2) of the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. §6701, et seq.) (the "Public Works Act") that 10% of the grants made thereunder be allocated to "minority business enterprises" is permissible under the Due Process or Equal Protection provisions of the Constitution of the United States?

B. Whether Section 103(f)(2) of the Public Works Act (the "set-aside amendment") is violative of Title VI of the Civil Rights Act of 1964?

In the present case, Appellants, as associations of (non-minority) contractors, contend that the set-aside amendment to the Public Works Act is a preference enacted by Congress to benefit minorities, which has an effect upon them so burdensome as to be illegal. They claim, therefore, that the set-aside amendment violates the modern equal protection standards of the Constitution and Title VI of the Civil Rights Act of 1964. In short, the contractors are attacking the constitutionality and legality of the set-aside amendment as a device for remedying the present effects of past racial discrimination against, in this case, minority business enterprises.

The case represents yet another attempt to undermine the already eroding public policy of the United States to take meaningful actions to remedy obvious manifestations of a prior policy of race discrimination as expressed by its laws, and as interpreted by its courts. The approach of Appellants is to question the competence of the courts to determine the obvious, but not expressly stated purpose of the set-aside provision, and their authority to take judicial cognizance of past discrimination where specific formal findings thereof were not made by the Congress. Appellants contend that this governmental device to eliminate the existing discrepancies between the races in the building industry, in the absence of a formal finding by the Congress of past discrimination, must fail constitutionally since it would, by favoring minorities, have an adverse impact upon non-minorities. The classic "reverse discrimination" issue, which considers it immaterial that non-minorities were favored in the past, is here presented to the Court, in the context of a federal grant program for local public works construction.

The *Amicus Curiae* respectfully urges the Court to

deny Appellants any relief; to uphold the unquestionably legitimate and obvious congressional purpose of the subject Act, and respectfully submits that the court below correctly framed and decided the issues presented.

IV. INTEREST OF THE AMICUS CURIAE

The *Amicus Curiae*, National Conference of Black Mayors, Inc. ("NCBM"), is a non-partisan, non-profit, service organization, formed to assist its membership, consisting of approximately 175 black mayors, in addressing the problems confronting them and the communities which they serve. The overwhelming majority of the mayors are recently elected with little or no previous experience in relating to the problems of municipalities. Most serve small, rural municipalities, with severely limited resources.

NCBM gears its programs and activities to, *inter alia*, develop the executive management capacity of the mayors, and to enhance and improve the efficiency and magnitude of the delivery of municipal services in their respective communities. Ultimately, it is hoped that NCBM will be instrumental in improving the social and economic well-being, and hence, enhancing the quality of life of the 22 million people, in the aggregate, which its members serve.

Most of the municipalities from which NCBM's members are elected are comprised of populations which are predominantly black, and many of the nation's black-owned businesses operate in and comprise a significant portion of the tax base of such municipalities. Hence, these communities stand to benefit doubly: indirectly from the set-aside provision of the Public Works Act, and directly as grantees. The overall well-being of a com-

munity is dependent upon the vitality of its business community. Thus, it is in NCBM's interest that the decision of the court below be upheld by this Court.

V. ARGUMENT

A. The Set-Aside is a Legally Appropriate Mechanism to Attain Legitimate Governmental Goals.

The principle that race may be utilized by government as a valid classification in formulating remedies to overcome the effects of past racial discrimination against that same race is now finally and firmly entrenched in the law.[1] Such classifications may have legitimate governmental objectives and are not, therefore, per se violations of the Due Process or Equal Protection Clauses.[2]

The constitutional validity of the set-aside as a device for eliminating obvious discrepancies existing between small business concerns comprised of socially or economically disadvantaged persons mostly from ethnic minorities, and the business community at-large, is now well established.[3]

Obviously, as the court below concluded after careful examination of the circumstances surrounding the adoption of the set-aside amendment in question, its purpose was to remedy the continuing effects of past discrimination against racial and ethnic minorities.[4]

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[1] *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). See also, *Kahn v. Shevin*, 416 U.S. 351 (1974).

[2] See the concise discussion in *Contractors Assn. of W. Pa. v. Kreps*, 573 F.2d 811, 85 (1978).

[3] *Eastern Canvas Products, Inc. v. Brown*, 580 F.2d 675 (D.C. Cir., 1978), *Ray Ballie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 411 U.S. 914 (1974); *Valley Forge Flag Co. Inc. v. Kleppe*, 506 F.2d 243 (1974); *Fortec Constructors v. Kleppe*, 350 F.Supp. 171 (D.D.C. 1972).

[4] *Fullilove v. Kreps*, 584 F.2d 600, 604-05 (2d Cir. 1978).

Appellants' constitutional attack on the set-aside amendment is based upon the absence of formal specific findings of the present effects of past discrimination in the construction industry. The issue becomes, therefore, whether the constitutionality of the set-aside amendment is impaired as a result thereof.

B. Easily Discernible Conditions Exist which the Congress Obviously Sought to Remedy by the Set-Aside Amendment.

It has, for some time now, been widely recognized that minority businesses are not an integral part of America's free enterprise system.[5] While the specific hard statistical data regarding minority businesses may not be at the fingertips of most reasonably aware members of the general public, the general state of affairs as to how minority business enterprises fare in the larger economy should be a matter of common knowledge. Members of Congress are required, by the nature of their duties, to be even more informed as to such matters.

For example, a cursory look at the state of the largest ethnic group represented among minority business enterprises, blacks, presents a telling picture.[6] In 1978, e.g., Campbells Soup Company produced more revenue from its soup sales than was produced by the aggregate of the sales of all 100 of the largest black-owned businesses taken together![7] The construction industry is no exception.

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[5] See, e.g., Summary of Activities of the Committee on Small Business, 94th Cong., 2d Sess., 182-83 (1976).

[6] Approximately 51% of all minority business enterprises in the United States are owned by blacks. 1972 Survey of Minority-Owned Business Enterprises, Bureau of the Census Special Report (May 1975).

[7] *Conpare Fortune*, May 7, 1979, at 274, *with Black Enterprise*, June 1979, at 140.

In 1972, the latest year for which census data are available, minority business enterprises accounted for slightly more than one percent of the total gross revenues produced in the construction industry.[8] That such conditions, in fact, exist cannot be ignored by the Court.

C. The Absence of Formal Congressional Findings Regarding the Specific State of the Minority Business Enterprise in the Construction Industry Does Not Render the Set-Aside Amendment Constitutionally Invalid.

The absence of specific congressional findings of present manifestations of past discrimination based upon race does not, of course, result in the conclusion that such manifestations do not exist. If it appears to the Court that the legislative act under scrutiny has a rational basis in fact, its validity should be upheld and the will of the Congress respected.[9] Strict scrutiny does not require a different result.[10]

The effect of the Court adopting the Appellants' view that the absence of formal legislative findings aborts the attempt of Congress to remedy a perceived condition, would be a substantial and unwarranted encroachment by the Judiciary upon the Legislative branch of government. It would establish the principle that Congress may not enact by floor amendment, measures calculated to

[8] *Compare* 1972 Survey of Minority-Owned Business Enterprises, supra note 6, *with* 1972 Census of Construction Industries, Bureau of the Census (June 1976). The figures were $152.7 billion in receipts for all construction firms as compared with $1.7 billion for all minority firms.

[9] See, e.g., *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, *cert. denied*, 396 U.S. 1004 (1970).

[10] *Regents of the Univ. of Calif. v. Bakke*, supra note 1, at 365-66 (opinion of Brennan, J.).

remedy the effects of a historically documented, unconstitutional denial of equal protection based upon race or national origin. Moreover, such a result would undermine the inherent respect which one branch of government must have for another under our separation of powers scheme of government.

The court below, it is submitted, utilized the appropriate standard of judicial review of the actions of Congress.[11] It reviewed, rationally and analytically, the events surrounding the passage of the set-aside amendment giving its co-equal branch of government the benefit of any doubt; concurred in the relevance of information generally available on the subject of the lack of opportunities for minority business enterprises generally and that information specifically available to the Congress, and concluded that:

> [the trial] judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record and establishes a "perceived" basis for congressional action.[12]

Laws are not enacted in a vacuum but against the backdrop of history, subject to the influence of the personal experiences of the legislators who are guided by the dictates of common sense and act on the basis of available information.

D. No Violation of Title VI Exists because the Requisite Harm Resultant from the Suspect Classification Has Not Been Established.

The benefits of Title VI of the Civil Rights Act of 1964, of which Appellants seek to avail themselves, may only be invoked upon a showing of harm resultant from govern-

[11] Id. at 365-66 (opinion of Brennan, J.).

[12] *Fullilove v. Kreps*, supra note 4, at 606.

mental action predicted upon a racial or other prohibited classification. That is to say, the issue of "reverse discrimination" resultant from a preferential classification is without merit unless the person or class seeking the protection of Title VI can establish the imposition of a substantial burden directly resultant from the preference.[13]

The burden which was imposed upon Mr. Bakke, for example, as a result of the preferential treatment afforded minorities by the University of California Medical School was direct, personal and substantial: the denial of his admission to medical school for two consecutive years. The governmental burden which Appellants are asked to bear is mild by comparison. Here, the obvious compelling interest of the federal government, consistent with its long established policy, is to remedy the effects of past discrimination against minorities and easily outweighs the potential harm which non-minority contractors *might* suffer (only in the event of the occurrence of several contingencies, if at all) by the enforcement of the set-aside amendment by the Secretary of Commerce.[14]

Even assuming that all 10% of the total of $6 billion appropriated by the Congress through May 1977 was expended for minority business enterprises which were wholly minority,[15] it could not be reasonably concluded that such an expenditure would have any meaningful adverse impact upon non-minority business enterprises

[13] *Regents of the Univ. of Calif. v. Bakke*, supra note 1, at 299-300 (opinion of Powell, J.).

[14] See *Fullilove v. Kreps*, supra note 4 at 602.

[15] By virtue of the definition of "minority business enterprise" in Section 103(f)(2) of the Public Works Employment Act of 1977, as "a business at least 50 per centum of which is owned by minority group members", it is possible that as many as one-half of the individual beneficiaries of the set-aside amendment may be non-minority.

or any discernible segment thereof. No such showing has been made by Appellants in the case at hand.

Accordingly, under the circumstances, there is no substantial burden of the effect of ameliorating the vestiges of discrimination against minorities in the area of business opportunity, to be borne by non-minority members represented by the Appellants in the case *sub judice*.[16]

[16] See discussion in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773-78 (1976) where the Court recognized that:

> a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "attainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." (Citing *Phelps Dodge v. NLRB*, 313 U.S. at 188)

VI. CONCLUSION

For the foregoing reasons, we respectfully request that this Court uphold and support not only the legality. but the appropriateness of the set-aside device as a legitimate governmental exercise to remedy the lingering effects of past discrimination. That this Court, in effect, declare it the public policy of this nation to encourage and obligate the powers of government to affirmatively foster equality of opportunity in all aspects of the life of its citizens, and to provide remedial measures as long as the obvious need exists, especially in situations such as the one here presented, where the adverse effect upon another classification of citizens is minimal at best.

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I, BERNARD PARKS, one of the attorneys for the *Amicus Curiae*, National Conference of Black Mayors, Inc., and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 6th day of October, 1979, I served copies of the foregoing *Amicus Curiae* Brief upon the parties as follows:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1007

H. EARL FULLILOVE, et al.,

Petitioners,

—against—

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS, *AMICI CURIAE*

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IN THE

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OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,

Petitioners,

against

JUANITA KREPS, Secretary of Commerce of the United States of America, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS, AMICI CURIAE

Interest of the Amici*

The American Civil Liberties Union for 59 years has devoted itself exclusively to protecting the fundamental

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* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

rights of the people of the United States.

For nearly a decade, the governing board of our 200,000-member national organization has vigorously debated the issue of "numerically based affirmative action." The intensity and vigor of our discussions have heightened the ACLU's realization that the major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded.

In recognition of this right, the ACLU in 1973 adopted the following policy:

> "The root concept of the principle of non-discrimination is that individuals should be treated individually, in accordance with their personal merits, achievements and potential, and not on the basis of the supposed attributes of any class or caste with which they may be identified. However, when discrimination--and particularly

> when discrimination in employment and education--has been long and widely practiced against a particular class, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind' standards for selection among the applicants for available jobs or educational programs. Affirmative action is required to overcome the handicaps imposed by past discrimination of this sort; and, at the present time, affirmative action is especially demanded to increase the employment and the educational opportunities of racial minorities."

Pursuant to this policy, the ACLU, amicus curiae, filed a brief in this Court supporting the constitutionality and legality of the sixteen percent set aside for disadvantaged minorities in the race conscious admissions program at issue in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The ACLU and SALT, amici curiae, also filed a brief in this Court supporting the legality of the numerical goals, ratios and timetables in the race conscious on-the-job training program at issue in United Steelworkers of America v. Weber, 61 L.Ed.2d 480 (1979).

Subsequent to this Court's decision in Bakke, the ACLU's governing board again debated the appropriateness of numerically based affirmative action. As a result of these debates, our governing board in March 1979 "reaffirm[ed] the continuing need for vigorous efforts to redress the adverse effects of racism...in American society," and encouraged the adoption of numerical measures designed to remedy "current disadvantage caused by discrimination, whether specific or societal." Our revised policy also states with approval:

> "As Justice Blackmun has recognized [in *Bakke*], 'In order to get beyond racism, we must first take account of race.... We cannot--we dare not--let the Equal Protection Clause [perpetuate] racial supremacy.' [438 U.S. at 407]"

The instant case, following on the heels of Bakke and Weber, presents another facet of affirmative action: a race conscious law which sets aside ten percent of the contracts in a new government contracting program for

minority business enterprises. Premised upon nearly a decade of special but inadequate assistance for minority business enterprises, and specifically directed at alleviating the high unemployment rate in minority communities, this congressional enactment is but one more step necessary to get beyond racism.

The United States Court of Appeals for the Second Circuit found this congressional enactment constitutional. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978).

For the reasons expressed in this brief, the ACLU urges this Court to affirm that decision.

The Society of American Law Teachers is a professional organization, formed in 1973, of approximately 400 professors of law at more than 120 law schools in the United States. Among its stated purposes is the encouragement of fuller access of racial minorities to the legal profession; since its inception the Society has been active in supporting the adoption and maintenance of special

minority admissions programs at American law schools. Its position is that voluntary affirmative action programs are fully consistent with the requirements of the Constitution of the United States and federal laws designed to eradicate racial dsicrimination. In accordance with this position, it has filed an amicus curiae brief, urging reversal, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and has joined with the American Civil Liberties Union in filing an amici curiae brief urging reversal in United Steelworkers of America v. Weber, 41 L.Ed.2d 480 (1979). Like the affirmative action programs involved in Bakke and in Weber, the MBE ten percent set aside involved in the present case represents an affirmative effort, this time by the federal government, to end the historic exclusion of blacks and other racial minorities from the American mainstream. If true racial equality is ever to be achieved in this Nation, it is imperative that such affirmative efforts be upheld by this Court.

For these reasons, the Society of

American Law Teachers joins the ACLU in this brief, urging this Court to affirm the judgment of the United States Court of Appeals for the Second Circuit, and to uphold the validity of the MBE ten percent set aside.

STATEMENT OF THE CASE

In 1976, the national unemployment rate was 7.7%, with the nonwhite rate nearly double at 13.1%.[1] A year later, there had been little improvement. The national unemployment rate was 7.0%, while the nonwhite rate remained at 13.1%.[2]

Congress, in the exercise of its economic powers, sought to reduce these high rates of unemployment and to stimulate general economic recovery from the lingering recession of several years earlier. It did so, in part, by enacting legislation authorizing billions of dollars for state and local government public works projects. One such enactment was the Local Public Works Capital Development and Investment Act of 1976, Pub.L.No. 94-369 (July 22, 1976), 90 Stat. 999, 42 U.S.C. §§6701, et seq. In that Act, Congress authorized

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1. U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, 143 (Jan. 1978).

2. *Id.*

the Secretary of Commerce, acting through the Economic Development Administration, to distribute two billion dollars to state and local governments for local public works construction projects. 42 U.S.C. §§6701, 6702, 6710. As part of the Act, Congress established priorities and preferences for state and local governments in jurisdictions with particularly high unemployment rates and directed that grants should provide employment for unemployed persons in those jurisdictions. 42 U.S.C. §6707. Congress also incorporated into the Act a nondiscrimination provision similar to that of Title VI of the Civil Rights Act of 1964 and directed that it be enforced in a manner similar to that which is used to enforce Title VI. 42 U.S.C. §6727. Finally, Congress directed that the two billion dollar authorization be allocated and expended no later than September 30, 1977. 42 U.S.C. §6710.

In the spring of 1977, Congress recognized that its two billion dollar authorization was insufficient to reduce

unemployment or to stimulate economic recovery. It thus amended the law by enacting the Public Works Employment Act of 1977, Pub.L.No. 95-28 (May 13, 1977), 91 Stat. 116, 42 U.S.C. §§6701, et seq., as amended. The new Act increased the overall authorization to six billion dollars, 42 U.S.C. §6710, as amended; altered the priorities and preferences so as to increase the grants available to local governments in jurisdictions with particularly high rates of unemployment, 42 U.S.C. §6707, as amended; encouraged the Secretary to award grants to construction projects which would result in energy conservation, id.; changed the nondiscrimination enforcement provision from one paralleling Title VI to one paralleling the mandatory enforcement provisions in §122 of the State and Local Fiscal Assistance Act of 1972 ["the Revenue Sharing Act," 31 U.S.C. §1242], 42 U.S.C. §6727, as amended; and directed that no grants be made to a state or local government applicant unless the applicant assured the Secretary that at least ten percent

of the amount of each grant would be expended for minority business enterprises, 42 U.S.C. §6705(f)(2).

The last amendment, the subject of this litigation, provides as follows:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.*

This amendment, generally referred to as the "MBE [Minority Business Enterprise] ten percent set aside," was authored by Representative Parren J. Mitchell, who, at that time, was Chairman of the Subcommittee on Domestic

Monetary Policy of the House Committee on Banking, Finance and Urban Affairs; and Chairman of the Task Force on Human Resources of the House Committee on the Budget.

The amendment reflected a decade of experience by Congress and by the Executive Branch with providing economic and business assistance to minority business enterprises.

1. The Background of Minority Business Enterprise Programs

The preference in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), for Minority Business Enterprises did not originate with that law. Rather, it derives from a compendium of federal laws, federal regulations, and Executive Orders which together comprise the Minority Business Enterprise Program.

The origin of the MBE Program dates back to the enactment of the Small Business Act of 1953, Pub.L.No. 83-163 (July 30, 1953), 67 Stat. 232, an Act

which was replaced in 1958 by a new law known as "the Small Business Act," Pub. L.No. 85-536 (July 18, 1968), 72 Stat. 384. Amended at various times since then, the Small Business Act currently is codified at 15 U.S.C. §§631, et seq.

The evident purpose of the Small Business Act was to strengthen the economic position of small businesses, especially those businesses located in areas with high unemployment and with high proportions of low income individuals. 15 U.S.C. §631(b). In order to effectuate these objectives, Congress created the Small Business Administration ["SBA"], and directed that it be "under the general direction and supervision of the President." 15 U.S.C. §633(a). Under this direction and supervision, the SBA was authorized to make loans, guarantee loans, and provide for technical assistance to small businesses. 15 U.S.C. §636. Most significantly, under what is known as the Section 8(a) Program, the SBA was empowered to enter into procurement contracts with federal agencies and to

arrange for the performance of such contracts by letting subcontracts to small business enterprises. 15 U.S.C. §637(a).

Despite the beneficent purposes of the Small Business Act, the SBA was unexpectedly inactive for the first fifteen years of its existence. Virtually no aid of any significance flowed from the SBA to any small businesses, much less to minority business enterprises.[3]

In 1969, the SBA was awakened from its slumber. Acting under the authority granted by 15 U.S.C. §633(a), President Richard Nixon issued Executive Order 11458, 3 C.F.R. 109, 34 Fed.Reg. 4937 (March 5, 1969). With that Executive Order, the Minority Business Enterprise Program was formally established. The Order created within the SBA the Office of Minority Business Enterprise ["OMBE"] and further created a President's

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3. *See generally,* United States Commission on Civil Rights Report, Minorities and Women as Government Contractors, 29 n.54, 35 (May 1975).

Advisory Council for Minority Enterprise. The explicit purpose of the Executive Order was to rejuvenate the Section 8(a) Program so as to award procurement subcontracts to minority business enterprises.

A year later, President Nixon supplemented the foregoing Order with Executive Order 11518, 3 C.F.R. 109, 35 Fed.Reg. 4939 (March 21, 1970). That Order directed all federal departments and agencies to increase the proportion of procurement contracts to small businesses, especially to minority business enterprises.

In 1971, President Nixon superseded the old Orders with Executive Order 11625, 3 C.F.R. 213, 36 Fed.Reg. 19967 (Oct. 13, 1971). Titled as a "National Program for Minority Business Enterprise," the Executive Order was premised upon the recognition that the OMBE had "facilitated the strengthening and expansion of our minority enterprise program" but that it was necessary to make better use "of resources and opportunities in the minority enterprise

field" by authorizing the Secretary of Commerce "to implement Federal policy in support of the minority business enterprise program" and "to coordinate the participation of all federal departments and agencies in an increased minority enterprise effort." Id. The Executive Order indeed sought to accomplish such a national program. Section 1 of the Order required the Secretary to coordinate all federal, state, local and private efforts to strengthen minority business enterprises; Section 2 continued the existence of the Advisory Council for Minority Enterprise; Section 3 directed all federal departments and agencies to cooperate with the Secretary and to foster and promote minority business enterprises; and Section 5 authorized the Secretary to take all steps necessary to achieve the purposes of the Order. In Section 6 of the Order, "minority business enterprise" was formally defined:

> "'Minority business enterprise means a business enterprise that is owned or controlled by one or more

> socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts." *Id.*

The foregoing definition of "minority business enterprise" was reiterated and further refined in new regulations issued by the SBA under its Section 8(a) Program. The pertinent regulation, 13 C.F.R. §124.8-1, 31 Fed. Reg. 13729 (May 25, 1973), provides in part:

> "(b) *Purpose*. It is the policy of SBA to use such authority to assist small business concerns owned and controlled by socially or economically disadvantaged persons to achieve a competitive position in the market place.
>
> "(c) *Eligibility*.--(1) *Social or economic disadvantage*. An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from

cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, Oriental Americans, Eskimos, and Aleuts. Vietnam-era service in the Armed Forces may be a contributing factor in establishing social or economic disadvantage.

"(2) *Ownership and control*. Disadvantaged persons must presently own and control the concern except where a divestiture agreement or management contract, approved by the Associate Administrator for Procurement and Management Assistance, temporarily vests ownership or control in non-disadvantaged persons.

"(i) *Proprietorships*. An applicant concern may be a proprietorship.

"(ii) *Partnerships*. The ownership of at least a 50-percent interest in the partnership by disadvantaged persons will create a rebuttable presumption of ownership and control.

"(iii) *Corporations*. The ownership of at least 51 percent of each class of voting stock by disadvantaged persons will create a rebuttable presumption of ownership and control." *Id.*

No longer allowed to remain dormant, the SBA, acting through the OMBE, revived the Section 8(a) Program and began to award government procurement subcontracts to minority business enterprises. In

Fiscal Year ["FY"] 1968, for example, the SBA had awarded only 8 contracts totaling approximately $10.5 million to MBEs. In FY 1972, the SBA had increased its efforts by awarding 1720 contracts totaling more than $153 million to MBEs. Despite this dramatic increase, the procurement contracts awarded to minority firms under the Section 8(a) Program nonetheless were relatively minimal. In FY 1972, these contracts represented less than 0.3 percent of the total $57.5 billion of federal procurement.[4]

In the years subsequent to its establishment, the MBE Program was of course subjected to periodic review inside and outside Congress. In several reports to Congress, the MBE Program was praised as necessary and yet criticized as insufficient.[5] In response, Congress continued the MBE

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4. *Id.* at 41.

5. *See, e.g.*, House Comm. on Small Business, Summary of Activities, H.R. No. 94-1791, 94th Cong., 2d Sess. (1977); GAO Report to Congress: Questionable Effectiveness of the 8(a) Procurement Program 32 (April 1975).

Program. And although the Small Business Act was amended on several occasions in the early 1970s,[6] Congress kept the Section 8(a) Program intact.

The use of race conscious programs to assist minority business enterprises has not been limited to the SBA. They also have been adopted by Congress, for example, as part of the Railroad Revitalization & Regulatory Reform Act of 1976, Pub.L. No. 94-212 (Feb. 5, 1976), 90 Stat. 31, 49 U.S.C. §1657a. Under the Revitalization Act, as amended, Congress authorized the

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6. The Small Business Act Amendments of 1974, Pub.L.No. 93-386, 88 Stat. 742, increased the loan, guaranty, and investment ceilings of the Agency.

The Small Business Act Amendments of 1976, Pub.L.No. 94-305, 90 Stat. 667, established the Office of Export Development; aided the procurement of equipment to meet government pollution control standards; made changes in corporate securities requirements; provided for investment guarantees; assumed jurisdiction over unincorporated investment companies; repealed limitations on bank investment; provided for loans for plant acquisition; increased the amount available for economic opportunity loans, local development company loans, and regular business loans; and established the National Commission on Small Business in America.

establishment of a race-conscious administrative body, "The Minority Resource Center," whose specific and sole function was to assist and to encourage minority business enterprises. 49 U.S.C. §1657a (e). Thus, the Minority Resource Center was empowered to "enter into such contracts, cooperative agreements, or other transactions as may be necessary in the conduct of its functions and duties." 49 U.S.C. §1657a(e).

The federal regulations promulgated under the Act require detailed affirmative action programs to be established to guarantee employment and contractual opportunities. Specific goals and timetables must be established to hire minority employees in proportion to their percentage in the work force of the contracting area where prior underutilization of minority employees renders such establishment appropriate. 49 C.F.R. 265.13b(5). A similar provision for specific goals and timetables exists for minority businesses. 49 C.F.R. 265.13c(3)vi.

Overall, both Congress and the

Executive acted on numerous occasions prior to 1977 to strengthen minority business enterprises with the intent of increasing their share of government contracts. But the efforts fell far short of altering governmental exclusion of minority business enterprises from receipt of government contracts.

2. The Background of Government Contracting

Despite the federal government's Minority Business Enterprise Program, minority businesses have not fared well under government contracting. In FY 1972, for example, only 0.7 percent of all federal procurement contracts were awarded to minority business enterprises.[7] (Approximately half of these MBE contracts were awarded through the SBA's Section 8(a) Program.[8]) Since FY 1972, MBEs consistently have shared less than one percent of all federal procurement contracting.[9]

7. *See* note 3, *supra*, at 6.

8. *Id.*

9. U.S. Department of Commerce, A New Strategy for Minority Business Enterprise Development, at 4 (April 1979).

This exclusion of minority business enterprises from government contracting is not simply the result of open, competitive bidding. Indeed, most federal procurement contracts are awarded not through open, competitive bidding, but through negotiation with competing firms, and through "sole source" negotiation without competition. The latter methods of awarding multi-million dollar contracts is justified by the government on grounds of urgency, lack of competitors, need for standardization, and other factors.

Noncompetitive "sole source" contracting accounts for a sizeable portion of all federal contracts. It, in fact, has been the primary means of contracting used by such agencies as the Department of Defense, the National Aeronautics and Space Administration, and the Department of Energy (formerly the Atomic Energy Commission and the Energy Research and Development Administration).[10] Significantly, in FY 1972, these three agencies alone accounted for $43.2 billion or more than 70 per-

10. See note 3 *supra*, at 2, 6, 7.

cent of the $57.5 billion of federal procurement contracts.[11]

Given the small size of most MBEs and the relatively smaller size of contracts awarded by state and local governments, it might be expected that a higher proportion of these contracts would be awarded to MBEs. This should be especially true since state and local governments spend far more proportionately than the federal government for construction (approximately 40% by state and local governments compared to less than 10% by the federal government), and since a disproportionately large percentage (approximately 10%) of minority firms are small construction contractors.[12]

Whatever the expectations may be, state and local governments have been no less exclusionary than the federal government. In some instances, MBEs have been totally excluded from state and local contracting. For example, during FY 1972, Denver's Department of Public Works awarded more than $23

11. *Id.*

12. *Id.* at 9.

million in contracts but none went to minority businesses.[13] California, which has an annual procurement budget of $500 million, awarded merely $10,000 in contracts to minority enterprises in FY 1972 and only $60,000 during FY 1973.[14]

Overall, of the $62.5 billion spent by state and local governments on goods and services in the private sector in 1972, less than 0.7 percent of all contracting dollars were awarded to minority firms.[15]

This record, like the federal government's record, is appalling in itself. And it was no doubt appalling to Congress, which had increased federal aid to state and local governments from $2 billion in FY 1950 to $45 billion in FY 1974.[16]

13. U.S. Commission on Civil Rights, note 3 *supra*, at 95.

14. *Id.* at 97.

15. *Id.* at 95.

16. *Id.* at 89.

3. The Enactment of the MBE Ten Percent Set Aside

When Congress in the spring of 1977 considered enactment of the Public Works Employment Act of 1977, it had before it numerous reports summarizing the severe underrepresentation of minority business enterprises in federal, state and local government contracting.[17] Congress knew, for example, that the federal government and state and local governments together awarded more than 99% of all government procurement contracts to white business enterprises.[18] Congress also was aware that SBA's Section 8(a) Program applied only to federal procurement, and that even there it had not been successful in remedying the federal government's historic exclusion of MBEs from federal contracting.[19]

17. *See, e.g.*, U.S. Commission on Civil Rights "Minorities and Women as Government Contractors" (May 1975); GAO Report to Congress, "Questionable Effectiveness of the 8(a) Procurement Program" (April 1975).

18. U.S. Commission on Civil Rights, *supra*, at vii.

19. GAO Report to Congress, *supra*, at 4.

Congress, like the courts, was also aware that most government construction contracts are awarded by state and local governments, that most construction firms are formed by entrepreneurs who are skilled craft workers, and that the extensive racial discrimination in the building trades had prevented minority workers not only from obtaining necessary skills but also from forming their own viable concerns. These latter conclusions were known to Congress as evidenced by its rejection of legislative efforts in 1969 and 1972 to eviscerate the affirmative action requirements imposed on the construction industry by Executive Order 11246,[20] and its own observations.[21]

20. The 1969 and 1972 legislative history is set forth in the Brief of the ACLU and SALT, *amici curiae*, at 75-89, filed in United Steelworkers v. Weber, 61 L.Ed.2d 480 (1979).

21. In United Steelworkers of America v. Weber, 61 L.Ed.2d 480 (1979), this Court took judicial notice of the past discrimination in the construction industry, stating:

> "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, *e.g.*, *United*

Aware of these conditions, Congress in the early spring of 1977 focused on legislation that could help to remedy some of these past patterns: the Public

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States v. *International Union of Elevator Constructors*, 538 F.2d 1012 (CA3 1976); *Associated General Contractors of Massachusetts* v. *Alshuler* [sic], 490 F.2d 9 (CA1 1973); *Southern Illinois Builders Association* v. *Ogilve* [sic], 471 F.2d 159 (CA3 1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (CA3 1971); *Local 53 of International Association of Heat & Frost, etc.* v. *Vogler*, 407 F.2d 1047 (CA5 1969); *Buckner* v. *Goodyear*, 339 F.Supp. 1108 (ND Ala. 1972), aff'd without opinion, 476 F.2d 1287 (CA5 1973). See also United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 58-94 (1976) (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma (1944) 1079-1124; R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); S. Spero and A. Harris, The Black Worker (1931); United States Commission on Civil Rights, Employment 97 (1961); State Advisory Committee, United States Commission on Civil Rights, 50 States Report 209 (1961); Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed Jacobson, Anchor 1968) p 145; App, 63, 104." 61 L.Ed.2d at 486 n.1.

Works Employment Act of 1977. Designed to decrease unemployment and to speed economic recovery, the Act authorized the expenditure of $4 billion of new federal money for state and local government construction projects. Construction, of course, was the precise area where minorities in the past had suffered such egregious discrimination and where there nonetheless existed a sizeable number of minority businesses. Congress quite plainly was confronted with a vehicle which could remedy past patterns.

During the debates on H.R. 11, the House version of the Public Works Employment Act, Representative Mitchell offered the MBE ten percent set aside as an amendment to the Act. 123 Cong.Rec. H.1436 (daily ed. Feb. 24, 1977). He observed that it was consistent with the SBA and OMBE programs, and otherwise explained the amendment in considerable detail:

> "I want to commend the chairman and the members of the committee who have done a great deal to make this public works bill far more equitable than it was last year. They have targeted and have amended the legislation to cover areas of high unemployment and they have improved the

legislation so that it is a much better bill. But there is one shortcoming that I see in the bill that I am attempting to address through my amendment. That shortcoming is that there will be numerous contracts awarded at the local level for various public works projects, but in that there is no targeting--and I repeat--there is no targeting for minority enterprises.

"Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.' That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts.

"In the present legislation before us it seems to me that we have an excellent opportunity to begin to remedy this situation.

"I know what the points in opposition will be. The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government. The 8-A set aside under SBA has been tested in the courts more than 30 times and has been found to be legitimate and bona fide. We are doing it in this bill. We are targeting for the Indians, that is a set-aside. All that I am asking is that we set aside also for minority contractors.

"...That is because that is the only way we are going to get the minority enterprises into our system.

"...We cannot continue to hand out survival support programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system. So, I am deadly serious about it." 123 Cong.Rec. H.1436-37 (daily ed. Feb. 24, 1977).

Subsequent to Mr. Mitchell's introduction of the MBE ten percent set aside, the Committee of the Whole, for the most part, debated neither the purposes of nor the need for the amendment but rather its effect in jurisdictions where there were few or virtually no qualified minority contractors. This issue was first raised by Representative Abraham Kazen: "What happens in the rural areas where there

are no minority enterprises?" Id. Representative Mitchell responded that the amendment would not apply in those areas, that administrative procedures to this effect already were in operation under the minority contracting program encompassed in Executive Order 11246, and that the Secretary of Commerce was assumed to have a similar authority under the bill. Id. Another Member, Representative Robert Roe, Chairman of the Economic Development Subcommittee of the House Committee on Public Works and Transportation, proposed that the "assumption" be added to Representative Mitchell's amendment by making the MBE ten percent set aside non-mandatory through prefatory language: "Except to the extent the Secretary determines otherwise...." Id. at 1438. After further discussion, Representative Mitchell agreed: "I accept the amendment to my amendment." Id.

Throughout the entire debate in the House, no Member expressed any opposition to the MBE ten percent set aside. All of the commentary was favorable. Representative John Conyers, for example, stated

that "minority contractors and businessmen who are trying to enter in on the bidding process...get the 'works' almost every time. The sad fact of the matter is that minority enterprises usually lose out.... [T]hrough no fault of their own, [they] simply have not been able to get their foot in the door." Id. at 1440.

Additional comments in support of the MBE ten percent set aside were made by Representative Mario Biaggi who stressed the need to reduce the high rate of unemployment among minority workers and to remedy the exclusion of minority enterprises from government contracting:

> "I rise to indicate my full support of the amendment offered by my distinguished colleague from Maryland as amended by the gentleman from New Jersey (Mr. Roe). I consider the amendment wholly complementary to the bill as its objective is to guarantee to minority business enterprises that they too will benefit from the passage of this legislation.
>
> "This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority busi-

> nesses have been disolved [sic] in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
>
> "What the amendment seeks to do is guarantee that at least 10 percent of all funds in this legislation will go to contracts which will be awarded to minority business enterprises. This is not an unreasonable demand--in fact it is quite modest. If implemented however it could have great benefits to the entire minority community. Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be [r]emedied.
>
> "The objectives of this legislation are both necessary and admirable. Yet without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense of economic parity. This amendment will go a long way toward helping to achieve this parity and more importantly to promote a sense of economic equality in this Nation." *Id.*

After additional debate, Representative Mitchell's amendment was adopted on a voice vote by the Committee of the Whole. Id. at 1441.

The proceedings in the Senate on the Public Works Employment Act paralleled those in the House. Early in the debates

on S.427, the Senate version of H.R. 11, Senator Edward Brooke offered an MBE ten percent set aside amendment very similar to that adopted by the House. 123 Cong. Rec. S.3910 (daily ed., March 10, 1977).

Recognizing that the purpose of the Act was to increase employment, Senator Brooke focused on the severe unemployment of members of racial and ethnic minorities. He stated that it was "important that we focus on the unemployment experiences of different ethnic and racial groups in designing a sensitive and responsive jobs program. For example, among minority citizens, the average rate of unemployment runs double that among white citizens." Id.

Senator Brooke viewed the percentage targeting concept as "entirely proper, appropriate and necessary." Id.

> "It is a proper concept, recognized for example in this committee's bill which set aside up to 2½ percent for projects requested by Indians or Alaska Native villages. And, the Federal Government, for the last 10 years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the

set aside concept as a legitimate tool to insure participation by hitherto excluded or unrepresented groups." *Id.*

Senator Brooke added that the set aside also was appropriate:

> "It is an appropriate concept, because minority businesses' work forces are principally drawn from residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens. Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." *Id.*

Finally, echoing Parren Mitchell's observations, he noted that the program was "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." Id. Senator Brooke then assuaged possible concerns about the amendment:

> "Many have expressed concern about the impact of this amendment as a limitation on contracting in areas where there are few minorities. But this amendment is not a limitation. Rather, it is designed to facilitate greater equality in contracting. This amendment provides a rule-of-thumb which requires much more than the vague 'good-faith efforts' language which currently hampers our efforts to insure minority participation.
>
> "One final objection to this set-aside may be that it will cause undue delays in beginning these vital public works projects. In fact, EDA already maintains a roster for each State of capable and qualified minority enterprises who are ready and willing to work. These firms are capable of competitive bidding, and need the financial support which this potential level of Federal contracting will guarantee." *Id.*

As in the House, no Member raised any objection to the amendment. One Senator, however, voiced concern about the amendment. Senator John Durkin questioned the application of the amendment to states with small minority populations. Senator Brooke responded to this concern by noting that the language of his amendment insured the fair funding of projects through wide discretion granted to the Secretary.[22] Satisfied,

22. This language, which differs from that contained in the House version, reads:

Senator Durkin asked one last question:

> Mr. DURKIN. "May I be a co-sponsor?
> Mr. BROOKE. "Yes.
> Mr. PRESIDENT. "I ask unanimous consent that the name of the distinguished Senator from New Hampshire be added as a co-sponsor.
> The PRESIDING OFFICER. "Without objection, it is so ordered." *Id.*

The majority and minority floor managers, Senators Quentin Burdick and Robert Stafford, agreed to accept the amendment and it was adopted on a voice vote. Id. The differences between the House and Senate versions were resolved in ~~c~~onference, H.R. Conf.Rep. No. 95-230, 85th Cong., 1st Sess. at 9 (April 28, 1977); and the House version was enacted as law, 123 Cong.Rec. S.6755-6757 (daily ed.. April 29, 1977); 123 Cong.Rec. H. 3920-3935 (daily ed. May 3, 1977).

"This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on these lists." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

SUMMARY OF ARGUMENT

When Congress enacted the Public Works Employment Act of 1977, 42 U.S.C. §§6701, et seq., it sought to alleviate unemployment and to stimulate economic recovery in the private sector by authorizing $4 billion in new federal monies flowing to private contractors. Concerned about the especially high rate of unemployment among minority workers, aware of the inadequacy of past MBE Programs, and determined to alter the severe underrepresentation of minority business enterprises in government contracting, Congress targeted ten percent of the new federal monies for minority business enterprises. 42 U.S.C. §6705(f)(2). In view of the scope of the problems faced by Congress, this ten percent target, as described by Representative Mario Biaggi, was "not unreasonable--in fact it is quite modest." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

The ten percent set aside not only is quite modest. It also is lawful under

Title VI of the Civil Rights Act of 1964 and constitutional under the equal protection component of the Fifth Amendment.

1. The same Public Works Employment Act that contains the ten percent set aside, 42 U.S.C. §6705(f)(2), also contains a general nondiscrimination provision stating that no person shall "on the ground of race, color [or] national origin...be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity...[which] receives funds made available under this subchapter." 42 U.S.C. §6727(a). This language is virtually identical to the ban against discrimination found in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

Congress in 1977 quite obviously saw no inconsistency between the ban on discrimination and the Act's race conscious ten percent set aside for minority business enterprises. Whatever Title VI may have meant when it was enacted in 1964, see Regents of the University of California v. Bakke, 438 U.S. 265 (1978), its ban on discrimination was viewed by

Congress in 1977 as entirely consistent with race conscious set asides.

Even if the ten percent set aside were viewed in isolation from the Act's prohibition against racial discrimination parallel to that in Title VI, the ten percent set aside still would not violate Title VI. To the extent that any two legislative enactments conflict, it is settled that the specific act later in time controls the former general one.

Since the Public Works Employment Act of 1977 with its ten percent set aside was enacted by Congress after Title VI had been enacted, the ten percent set aside is not and cannot be unlawful under Title VI.

2. Among the unmistakeable purposes of the ten percent set aside, as summarized by Senator Edward Brooke, was the need to make "strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 Cong.Rec.

S.3920 (daily ed. March 10, 1977). Moreover, of crucial significance is the fact that the entire Public Works Employment Act was designed to fuel our economy by pumping $4 billion of new federal money into the coffers of private contractors. Because of the legislative design of this program, the ten percent set aside cannot be found to have been premised upon a racially discriminatory purpose. United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Washington v. Davis, 426 U.S. 229 (1976). Additionally, because it was a new program providing billions of dollars to white contractors, and because it in no way fenced out white contractors from receiving the lion's share of new government contracts, the legislative plan had no discriminatory impact upon whites. United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Palmer v. Thompson, 403 U.S. 217 (1971). "Having failed to show that the legislative... plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the

constitutional relief they seek." United Jewish Organizations v. Carey, 430 U.S. at 180 (concurring opinion of Stewart, J., with Powell, J.).

3. Even if this legislative plan had a discriminatory purpose or effect, the constitutionality of the ten percent set aside would be determined under the intermediate standard of review applicable to racial classifications which have a benign, compensatory purpose. Regents of the University of California v. Bakke, 438 U.S. 265, 355-380 (1978) (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). Indeed, the strict scrutiny standard of review is especially inapplicable here because the ten percent set aside is premised upon administrative and legislative findings of severe minority underrepresentation in government contracting, a problem which Congress is uniquely capable of remedying. Regents of the University of California v. Bakke, 438 U.S. 265, 300-310 (1978) (opinion of Powell, J.); Califano v. Webster, 430 U.S. 313 (1977); Hampton v. Mow Sun Wong,

426 U.S. 88 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

Under the intermediate standard of review, the ten percent set aside must be sustained. As in Bakke, the race conscious plan here serves the important and articulated purpose "of remedying the effects of past societal discrimination" in a context where "there is a sound basis for concluding that minority under-representation is substantial and chronic ...." 438 U.S. at 362 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). It also serves the important and articulated purposes of "building a viable minority business system," 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell); of "promot[ing] a sense of economic equality in this Nation," id. at 1440 (remarks of Rep. Biaggi); of "facilitat[ing] greater equality in contracting," 123 Cong.Rec. S.3910 (daily ed. March 10, 1977) (remarks of Sen.Brooke); and, of course, of fighting "the massive and chronic unemployment which plagues minority communities

throughout this country," id. Finally, as in Bakke, this race conscious plan neither "stigmatizes any group [n]or... singles out those least well represented in the political process to bear the brunt of [this] benign program." 438 U.S. at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

4. In view of the demonstrated inadequacy of past and ongoing MBE Programs to alter our government contracting practices which award less than 1% of all government contracts to minority business enterprises, the ten percent set aside would be sustained as constitutional even under the strict scrutiny standard of review. See Regents of the University of California v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). As Senator Brooke commented, the ten percent set aside is "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." 123

Cong.Rec. S.3910 (daily ed. March 10, 1977). The purposes of the race conscious set aside unquestionably are substantial and compelling; the set aside is necessary to accomplish its purposes; and no less restrictive alternative is available.

ARGUMENT

Shortly after Congress made $4 billion of new contracting money available to construction contractors, reserving only ten percent for the economic recovery of minority business enterprises, the MBE ten percent set aside in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), was roundly challenged in lawsuit upon lawsuit by various state and local chapters of the Associated General Contractors of America, Inc. The contractors' associations this time were not concerned with having to employ a few minority workers.[1] To be sure, they appreciated the federal largess. Nonetheless, they wanted to receive the same 99% to 100% of the contracts under this new program in the same manner as

1. This concern is reflected in, *e.g.*, Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

they had received 99% to 100% of all construction contracts in the past.

In response to the challenges, the lower federal courts, virtually without exception, upheld the MBE ten percent set aside as lawful and constitutional.[2]

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2. In addition to the court below, Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), the only other courts of appeals that have confronted the MBE ten percent set aside have upheld it. Ohio Contractors Association v. Economic Development Administration, 580 F.2d 213 (6th Cir. 1978); Constructors Association of Western Pa. v. Kreps, 573 F.2d 811 (3d Cir. 1978).

Eleven district courts have rejected challenges to the statute. Cases upholding the constitutionality of the challenged provision are: Rhode Island Chapter, Associated General Contractors of America v. Kreps, 450 F.Supp. 338 (D.R.I. 1978); Associated General Contractors of Kansas v. Secretary of Commerce, No. C.A.77-4218 (D.Kan. Feb. 9, 1978); Indiana Constructors, Inc., v. Kreps, No.IP 77-602-C (S.D.Inc. Jan. 4, 1979); Associated General Contractors of America, Inc. Alaska Chapter v. Kreps, No. F78-1 (D.Alas. Oct. 10, 1978), appeal filed, No. 78-3421 (9th Cir. Oct. 19, 1978); Frank Coluccio Construction Co. v. Kreps, No. F78-9-Civ. (D.Alas. Oct. 5, 1978).

Decisions denying preliminary injunction are: A.J. Raisch Paving Co. v. Kreps, No. 77-3977 (N.D.Cal. Dec. 15, 1977), appeal filed, No. 77-2497 (9th Cir. Dec. 20, 1977); Florida East Coast Chapter, Associated General Contractors of America v. Secretary of Commerce, No. C.A.77-8351

Given the uniqueness of this legislation, and in view of this Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), it is apparent that the near unanimity among the lower courts is correct. The MBE ten percent set aside is consistent with and lawful under Title VI of the Civil Rights Act of 1964, and it is constitutional under the Fifth Amendment.

(S.D.Fla. Nov. 3, 1977); General Building Contractors Ass'n v. Kreps, No. C.A.77-3682 (E.D. Pa. Dec. 9, 1977); Virginia Chapter, Associated General Contractors of America, Inc. v. Kreps, 444 F.Supp. 1167 (W.D.Va. 1978); Carolinas Branch, Associated General Contractors of America v. Kreps, 442 F.Supp. 392 (D.S.C. 1977); Michigan Chapter, Associated General Contractors of America, Inc. v. Kreps, No. C.A.M-77-165 (W. D.Mich. Jan. 4, 1978).

Three district courts have rendered decisions adverse to the constitutionality of the statute: Wright Farms Construction, Inc. v. Kreps, 444 F.Supp. 1023 (D.Vt. 1977) (unconstitutional as applied); Montana Contractors Association v. Secretary of Commerce, 460 F.Supp. 1174 (D.Mont. 1979) (unconstitutional as applied); Associated General Contractors of California v. Secretary of Commerce, 441F.Supp. 955 (C.D.Cal. 1977), vacated and remanded for determination of mootness, 438 U.S. 909 (C.D.Cal. 1978), appeals filed, Nos. 78-1107, 78-1108, 78-1114 (Nov. 17, 1978) (unconstitutional on its face).

I. THE MBE TEN PERCENT SET ASIDE IS CONSISTENT WITH TITLE VI AND LAWFUL IN VIEW OF THE CONTROLLING PRINCIPLE THAT SUBSEQUENT SPECIFIC CONGRESSIONAL ENACTMENTS PREVAIL OVER PRIOR GENERAL ONES

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), this Court was divided on the issue of whether Title VI's ban on racial discrimination prohibited a race conscious set aside favoring racial minorities. The Court's division in Bakke is irrelevant here. Whatever Congress may have intended in 1964, it is patent that Congress in 1977 perceived no conflict between Title VI's ban on discrimination and the ten percent set aside in the Public Works Employment Act of 1977. Even if any such conflict existed, the ten percent set aside would be lawful under the controlling principle that subsequent specific legislative enactments prevail over former general ones. See pp. 56-59, infra.

The immediate predecessor of the Public Works Employment Act of 1977 was the Local Public Works Capital Development and Investment Act of 1976, Pub.L.

No. 94-369 (July 22, 1976), 90 Stat. 999, 42 U.S.C. §§6701, et seq. When Congress enacted the 1976 Act, it added a Title VI nondiscrimination provision similar to those added to virtually all laws authorizing the expenditure of federal monies by state and local governments.[1] This provision, contained in §207(a) of the Act, 90 Stat. 1007, 42 U.S.C. §6727 (a), is virtually identical to the nondiscrimination provision contained in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.[2] Congress continued

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1. The nondiscrimination provision provided as follows:

> "No person in the United States shall, on the grounds of race, religion, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this subchapter." 42 U.S.C. §6727(a).

2. The nondiscrimination provision in Title VI provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

this parallel by requiring that the nondiscrimination provision in the 1976 Act be enforced in the same discretionary manner as Title VI is enforced.[3]

The following year, Congress substantially amended the 1976 Act by enacting the Public Works Employment Act of 1977, Pub.L. No. 95-28 (May 13, 1977), 91 Stat. 116, 42 U.S.C. §§6710, et seq., as amended. See pp. 8 - 10, supra. Among the amendments added by Congress in 1977 was the MBE ten percent set aside amendment, added by §103 of the 1977 Act, 91 Stat. 117, 42 U.S.C. §6705(f)(2), as amended. When it added this amendment, Congress saw no reason to alter the Act's nondiscrimination provision barring discrimination on grounds, inter alia, of race, color and national origin in "any program or activity" funded under

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The only difference between this provision and the nondiscrimination provision in the 1976 Act, *see* note 1, *supra*, is that the latter added religion and sex to the grounds of prohibited discrimination.

3. *Compare* the enforcement procedures in 207 (b)&(c) of the 1976 Act, 90 Stat. 1008, 42 U.S.C. §6727(b)&(c) with the nearly identical procedures under Title VI, 42 U.S.C. §2000d-1.

the Act, 42 U.S.C. §6727(a), as amended. And Congress did not change the use of Title VI procedure to enforce the nondiscrimination provision.[4] There, of course, was no need to do so since Congress viewed the MBE ten percent set aside as consistent with nondiscrimination.

When Representative Parren Mitchell introduced the ten percent set aside in the House, he reviewed the historical exclusion of minority business enterprises

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4. Interestingly, Congress several days later did change the enforcement procedures under the Act through enactment of another piece of legislation. Specifically, Congress strengthened the procedures by making enforcement not discretionary, as under Title VI, but mandatory through incorporation of the compulsory enforcement procedures contained in §§122, 124 and 125 of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§1242, 1244 and 1245, as amended. *See* 91 Stat. 166-167, 42 U.S.C. §6727, as amended.

The legislative vehicle for this change was the Intergovernmental Antirecession Act of 1977, an Act attached to the omnibus Tax Reduction and Simplification Act of 1977, Pub.L. No. 95-30 (May 23, 1977), 91 Stat. 126. In §605 of the omnibus Act, Congress slightly altered the nondiscrimination provision of §207(a) of the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §6727(a), by adding age and handicapped status to the grounds of prohibited discrimination; and significantly strengthened the enforcement provisions in 207(b), 42 U.S.C. §6727(b), by incorporating the mandatory procedures in the State and Local Fiscal Assistance Act. *See generally*, 91 Stat. 166-167, 42 U.S.C. §6727, as amended.

from government contracting and observed that the set aside was "an excellent opportunity to begin to remedy this situation." 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977). He added that the set aside was not discriminatory especially in view of the fact that"[t]he 8-A set aside under SBA has been tested in the courts more than 10 times and has been found to be legitimate and bona fide." Id. Representative Mario Biaggi supported the set aside precisely because it was nondiscriminatory; in fact, "without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

Senator Edward Brooke, author of the ten percent set aside in the Senate, was even more to the point. At the outset, he observed that "the Federal Government, for the last ten years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the set aside concept

as a legitimate tool to insure participation by hitherto excluded or unrepresented groups." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977). In view of this background, the amendment was neither discriminatory nor "a limitation. Rather, it [was] designed to facilitate greater equality in contracting." Id. (emphasis added).

Throughout the debates on the ten percent set aside, no Member of Congress saw the set aside as discriminatory. Instead, the only concern about the amendment was its effect in areas where there were few or no minority business enterprises, a concern that was wholly assuaged because of the waiver provisions in the amendment. See pp. 31-32, 37-38, supra. Assured that the set aside amendments would work no inequality but instead would facilitate greater equality, Congress adopted the set aside without any opposition whatsoever.

The Congress that enacted the ten percent set aside in 1977 quite obviously perceived no conflict between the set aside and the nondiscrimination provisions

contained in the 1977 Act itself or in Title VI.

Even if one assumes a direct conflict--which there is not--between the general anti-discrimination provisions of the Public Works Employment Act of 1977 at issue herein,[5] the subsequent, specific statute must be given precedence. If, as petitioners argue,[6] a basic inconsistency exists between the 1964 and 1977 Acts, traditional canons of statutory construction compel this Court to give effect to a subsequent Congressional enactment which is more specific in scope. See, e.g., Morton v. Mancari, 417 U.S. 535, 549 (1974). Where, as under petitioners' view, "the earlier and later statutes are irreconcilable;"[7] the last expression of legislative will must generally be respected. Of course, a specific expression of legislative will controls over a general statute without regard to priority of enactment. Id. at 550-551. See also, Radzanower v. Touche Ross & Co., et al., 426 U.S. 148, 154-155 (1976); Bulova Watch Co. v. United States, 365 U.S. 753 (1961). However, where, as here, the subsequent statute is more specific than the prior enactment, courts may not ignore the more recent expression of legislative will.

Petitioners argue that a Federal judge is free to disregard a subsequent, more specific Congressional enactment whenever the judge believes "the latter more particularized statute is less conducive to the public welfare." Brief for the Petitioners at 37.

Nothing could be further from the proper exercise of federal judicial power. As Chief Justice Burger noted

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5. Of course, this Court should attempt to give effect to both the 1964 and 1977 acts by recognizing that no conflict exists between them. *See generally*, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. National City Bank, 296 U.S 497 (1936).

6. Petitioners argue:
"The applicability of the Civil Rights Act clearly indicates that the MBE provision in the instant statute must be struck down because, most obviously, it cannot co-exist with the applicable provision of Title VI." Brief for Petitioners at 38.

7. Morton v. Mancari, *supra*, at 550.

for this Court in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978):

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
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> * * *
>
> "*[I]*n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our constitution vests such responsibilities in the political branches." *Id.* at 194-195.

II. THE MBE TEN PERCENT SET ASIDE, WHICH HAS NEITHER A DISCRIMINATORY EFFECT NOR A DISCRIMINATORY PURPOSE, IS CONSTITUTIONAL UNDER THE STANDARDS APPLIED IN UNITED JEWISH ORGANIZATIONS BY JUSTICES WHITE, STEVENS AND REHNQUIST, AND BY JUSTICES STEWART AND POWELL

Race conscious numerical measures, contrary to the petitioners' arguments to this Court,[1] are not unconstitutional per se. United Jewish Organizations v. Carey ["UJO"], 430 U.S. 144 (1977). Indeed, before the petitioners can invoke even the intermediate standard of review by this Court, they must show that the challenged classification has both a racially discriminatory purpose and at least a probable racially discriminatory effect. Id. See also, Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Palmer v. Thompson, 403 U.S. 217 (1971). They have shown and can show neither.

The use of benign racial measures by government agencies has been sanctioned

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1. *See* Brief for Petitioners at 9.

by this Court in a number of settings. Particularly wide latitude has been extended to school boards in assigning pupils and to states in drawing reapportionment boundaries.

As to pupil assignment, this Court in McDaniel v. Barresi, 402 U.S. 39 (1971), held that school boards, regardless of any findings of past discrimination, are empowered to assign students on the basis of race in order to enhance minority representation in otherwise predominantly white schools. See also, North Carolina Board of Education v. Swann, 402 U.S. 43 (1971).[2]

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2. This point was reiterated by Chief Justice Burger speaking for a unanimous Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16.

Similar to the manner in which school boards may voluntarily use race conscious numerical measures, reapportionment may be undertaken by a state using race conscious numerical measures.[3]

The underpinnings of these decisions are not that race conscious numerical measures may be used only by school boards or states. Rather, their constitutionality hinges upon the racial fairness of the practice. More particularly, as explained in UJO, their constitutionality results from their being discriminatory neither in purpose nor in effect.

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3. In his plurality opinion in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), Justice White stated:

> "[W]e think it also [is] permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." 430 U.S. at 168 (plurality opinion of White, J., joined by Rehnquist and Stevens, JJ.).

The issue in UJO centered upon a revised racial plan adopted by the State of New York in an effort to guarantee minority political representation in the state legislature[4] and to comply with the Voting Rights Act. One result of the revised plan was that a Hassidic Jewish community previously within a single, predominantly white assembly

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4. As described by the Court:

> " The revised 1974 plan, in its essentials, did not change the number of districts with nonwhite majorities, but did change the size of the nonwhite majorities in most of those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite. As for state assembly districts, both the 1972 and the 1974 plans provided for seven districts with nonwhite majorities. However, under the 1972 plan, there were four between 85% and 95% nonwhite, and three were approximately 76%, 61% and 52%, respectively; under the 1974 plan, the two smallest nonwhite majorities were increased to 65% and 67.5%, and the two largest nonwhite majorities were decreased from greater than 90% to between 80% and 90%." 430 U.S. at 151-152 (footnotes omitted).

district was split by new legislative boundaries separating portions of that community into assembly districts that were at least 65% minority. Over the objections of the white community, which sued to invalidate the revised plan as discriminatory, this Court upheld the plan as an appropriate race conscious numerical measure.

At the outset of his plurality opinion in UJO, Justice White rejected the white community's arguments that racial criteria were inherently unconstitutional.

> "Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." 430 U.S. at 161 (plurality opinion of White, J., joined by Brennan, Blackmun and Stevens, JJ.) (footnote omitted).

As Justice White summarized, "a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in

establishing a certain number of black minority districts." 430 U.S. at 162 (plurality opinion of White, J., joined by Brennan, Blackmun and Stevens, JJ.).

In Justice White's view, the racial redistricting plan in UJO was constitutional, at least in part, because it was consistent with the Voting Rights Act, a law which the Court had earlier upheld as constitutional. Katzenbach v. Morgan, 384 U.S. 301 (1966).[5] Yet, regardless of the Act, it also was constitutional because there was no discriminatory purpose or effect.

Speaking for himself and Justices Rehnquist and Stevens, Justice White conceded that the plan was race conscious, but because the plan did not stigmatize and did not fence out whites, it was constitutional:

> "There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma

5. For a discussion of how these decisions compel the constitutionality of the 10% set aside, *see* pp. 82-85, *infra*.

> with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment....
>
> "It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.... [E]ven if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." 430 U.S. at 165-166 (plurality opinion of White, J., joined by Rehnquist and Stevens, JJ.) (citations omitted).

Justices Stewart and Powell also voted to uphold the racial plan in UJO for the same reason: there was no discriminatory purpose or effect. At the outset, they observed that the constitutional "question is whether the reapportionment plan represents purposeful discrimination," and they noted that discriminatory "impact may afford some evidence that an invidious purpose was present." 430 U.S. at 179 (concurring opinion of Stewart, J., with Powell, J.).

The evidence failed to establish either condition:

> "But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent....
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> "Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek." 430 U.S. at 179-180 (concurring opinion of Stewart, J., with Powell, J.) (citation omitted).

The MBE ten percent set aside here is no different from the racial redistricting plan in UJO. To be sure, Congress used race in a purposeful manner. But race consciousness is not the equivalent of discriminatory purpose. The undeniable purpose was not to discriminate but to reduce minority unemployment, to enhance minority business enterprises, and to turn around the near total exclusion of MBEs from government contracting. The ten percent set aside--giving minority

businesses at long last a fair shake--could hardly be characterized as a slur or stigma with regard to whites or minorities.

Finally, there is no evidence in this record that the MBE ten percent set aside fenced out white contractors or in any way undervalued their political and economic power. Quite to the contrary, the Public Works Employment Act of 1977, a new program, added billions of dollars to their coffers--billions of dollars that would have been unavailable but for passage of the Act.

Without a discriminatory purpose or effect, the MBE ten percent set aside cannot be said to have caused any discrimination against white contractors. As such, the MBE ten percent set aside is per se constitutional.

III. THE MBE TEN PERCENT SET ASIDE ALSO IS CONSTITUTIONAL UNDER THE INTERMEDIATE STANDARD OF REVIEW APPLIED IN BAKKE BY JUSTICES BRENNAN, WHITE, MARSHALL AND BLACKMUN

Assuming arguendo that this Court characterizes the MBE ten percent set aside as having an invidious purpose and a discriminatory effect, the constitutionality of the benign set aside must be reviewed under the "intermediate" standard of review applied by Justices Brennan, White, Marshall and Blackmun in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Just as the strict standard of review was deemed inapplicable to the benign classification in Bakke, so too is it inapplicable here. Additionally, the strict standard of review applied by Justice Powell in Bakke is not appropriate here where there are legislative findings of severe minority underrepresentation in government contracting.

Under the intermediate standard of review, the MBE ten percent set aside is constitutional because it does not stigmatize any group and it is necessary to

remedy substantial and chronic minority underrepresentation in government contracting.

A. Because the MBE Ten Percent Set Aside Is Similar in Formulation and Purpose to the Sixteen Percent Special Admissions Program at Issue in Bakke, the Intermediate Standard of Review Is Applicable Here

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four of the five members of this Court who reached the constitutional issue declined to review the University's race conscious admissions program under the strict scrutiny standard of review. Neither Allan Bakke nor "whites as a class have any of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" 438 U.S. at 357 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (citations omitted).

Yet, the same four Justices also declined to review the University's racially benign program under the lenient rational basis standard of review. As Justices Brennan, White, Marshall and Blackmun observed: "'"[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."'" 438 U.S. at 358-359 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (citations omitted).

Wisely, Justices Brennan, White, Marshall and Blackmun adopted for benign racial classifications an "intermediate" standard of review--the standard applied to gender classifications. Specifically, "racial classifications designed to further remedial purposes '"must serve important governmental objectives and must be substantially related to achievement of those objectives."'" Id. (citations omitted). In addition,

> "because of the significant risk that racial classifications established for benign purposes can be misused...[further inquiry is necessary] to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." 438 U.S. at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

The benign program at issue in Bakke was an admissions program which set aside sixteen percent of the places in entering medical school classes for disadvantaged minority applicants. The program at issue here, the MBE ten percent set aside, is virtually identical in its benign purposes. As summarized by Representative Biaggi during the House debates on the MBE ten percent set aside:

> "What the amendment seeks to do is guarantee that at least 10 percent of all funds in this legislation will go to contracts which will be awarded to minority business enterprises. This is not an unreasonable demand--in fact it is quite modest. If implemented however it could have great benefits to the entire minority community. Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be [r]emedied.

"The objectives of this legislation are both necessary and admirable. Yet without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense of economic parity. This amendment will go a long way toward helping to achieve this parity and more importantly to promote a sense of economic equality in this Nation." 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977).

Just as the University's sixteen percent set aside admissions program at issue in Bakke was generated by benign purposes, so too is the MBE ten percent set aside a benign program reviewable by this Court under the "intermediate" standard of review.

B. The Intermediate Standard of Review Is Applicable Because--as Justice Powell Pointed Out in Bakke--the Racial Classification Here Is Premised upon Congressional Findings of Severe Minority Underrepresentation in Government Contracting

Application of the intermediate standard of review adopted for benign racial classifications by Justices Brennan, White, Marshall and Blackmun was not ruled out by Justice Powell in Bakke.

True, Justice Powell did apply strict scrutiny review to the race conscious admissions program at issue in Bakke, but he strongly implied that a lesser standard of review might be appropriate where there have been judicial, legislative or administrative findings of past discrimination or underrepresentation. 438 U.S. at 299-305 (opinion of Powell, J.).

Since the findings deemed necessary by Justice Powell were absent in Bakke, he chose not to apply a lesser standard of review to the University's benign program. Id. Here, however, there are both legislative and administrative findings made by government bodies charged with making such findings. Thus, under Justice Powell's own criteria, the intermediate standard of review for benign classifications is appropriate here.

For the most part, Justice Powell in Bakke referred to findings of "past discrimination" or of "unconstitutional discrimination." But the cases he relied on indicate that his views more broadly encompass findings of minority underrep-

resentation and include remedial measures certainly not limited to identified victims of past discrimination.

The crucial findings here of course are legislative and administrative.[1]

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1. With regard to the judiciary, Justice Powell in Bakke stated with approval that the courts "have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E.g.*, *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (CA2 1973); *Carter* v. *Gallagher*, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, *id.*, at 327." 438 U.S. at 301 (opinion of Powell, J.). In both Bridgeport and Carter there in fact had been judicial findings of past discrimination, but the race conscious numerical remedies were in no way limited to identified victims of that discrimination.

In Bridgeport, the district court had found that the written tests used to screen minority applicants from 1965 to 1970 for the position of police officer were discriminatory, not job related, and hence unlawful. In order to overcome this past discrimination, the district court imposed and the court of appeals approved a rigid remedy not limited to identified victims. With minority representation in the Bridgeport population at 25%, and minority representation in the Bridgeport Police Department then at only 3.6%, the court set a goal of 15% minority police officers. In order to reach this 15% goal, future minority applicants were to be placed in a separate minority pool: 50% of

Addressing such findings in Bakke, Justice Powell stated with approval that racial "preferences also have been upheld

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the next ten vacancies were to be filled from the minority pool; 75% of the next twenty vacancies were to be filled from the minority pool; and 50% of the vacancies thereafter were to be filled from the minority pool (alternatively hiring one minority and one white) until the goal was reached. 482 F.2d 1333 (2d Cir. 1973).

Carter is similar although the remedy was more strongly disputed. There the district court had found extensive, unlawful employment discrimination in the Minneapolis Fire Department. In order to overcome this past discrimination, the district court imposed a remedy not limited to identified victims of the identified discrimination. With minority representation in the Minneapolis population at 6.4%, and with no minority representation in the Fire Department, the district court set a goal of 3.7% and ordered that it be met by filling the next available twenty positions with minority applicants. A panel of the court of appeals, noting that there were no identified victims as plaintiffs and that the preference would benefit minorities generally, 452 F.2d at 325-326, reversed the absolute preference. Thereafter, the court of appeals *en banc*, again conceding that there were no identifiable victims of the discrimination, 452 F.2d at 328, approved a remedy by which 33% of the future hires would be minority applicants until twenty minority persons were hired and the 3.7% goal attained. The Supreme Court denied *certiorari*, 406 U.S. 950 (1972).

where legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. E.g., Contractors Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159 (CA3), cert denied, 404 US 854 (1971); Associated General Contractors of Massachusetts, Inc. v Altshuler, 490 F2d 9 (CA1 1973), cert denied, 416 US 957 (1974); cf., Katzenbach v. Morgan, 384 US 641 (1966)." 438 U.S. at 301-302 (opinion of Powell, J.) (footnote omitted). In footnote 41, Justice Powell extended this commentary by observing that Bakke did "not call into question congressionally authorized administrative actions, such as...approval of reapportionment plans under §5 of the Voting Rights Act of 1965.... In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, e.g., South Carolina v Katzenbach, 383 U.S. 301, 308-310 (1966)." 438 U.S. at 302 n.41 (opinion of Powell, J.).

For the most part, the cases relied on by Justice Powell involved no legislative or administrative findings of past unlawful or unconstitutional discrimination. Thus, these cases provide overwhelming support for the implication that findings of underrepresentation are sufficient.

Although there are pretensions in Contractors Association and in Altshuler that the race conscious numerical measures were based on identified past discrimination, there in fact were no legislative or administrative findings other than of underrepresentation.

In Contractors Association, the court upheld the goals and timetables imposed as bid conditions upon Philadelphia area construction contractors by the Office of Federal Contract Compliance pursuant to the United States Department of Labor's interpretation of Executive Order 11246--which requires contractors on federally assisted construction projects to "take affirmative action."[2]

2. As summarized by the court, the Department of Labor in June 1967 issued an order implement-

The goals and timetables, which became known as the Philadelphia Plan,

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ing the Executive Order in the Philadelphia area by requiring contract bidders "to submit 'acceptable affirmative action' programs 'which shall include specific goals of minority manpower utilization.'" Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 163 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The Department of Labor order delegated to an area office of the Office of Federal Contract Compliance the authority to set specific goals, and set forth the factors by which those goals were to be determined including:

> "'1) The current extent of minority group participation in the trade.
>
> 2) The availability of minority group persons for employment in such trade.
>
> 3) The need for training programs in the area and/or the need to assure demand for those in or from existing programs.
>
> 4) The impact of the program upon the existing labor force.'" 442 F.2d at 163-164.

In August 1969, three days of hearings were held to determine the appropriate goals under the foregoing criteria; and in September 1969, the goals for minority manpower utilization were determined for six of the skilled building trades. The goals actually were ranges imposed in steps over a four-year period. For example, required minority representation in the elevator construction workers increased from a range of 4%-8% in 1970 to a range of 19%-23% in 1973; in the ironworkers the goal was 5%-9% in 1970 and 22%-26% in 1973. 442 F.2d at 164.

were imposed without findings of past discrimination or even a formal identification of past discrimination.[3] Instead, the focus had been simply on the exclusion of minorities from the trades. For example, the Department of Labor found that "'there traditionally has been only a small number of Negroes employed in these...trades.'" 442 F.2d at 164. In the court's view, this finding and related data alone "may have been sufficient to justify administrative action leading to the specification of contract provisions." 442 F.2d at 177. But the court did not have to rely only on historical generalizations, for there also were administrative findings of severe minority underrepresentation.[4]

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3. As a result of the August 1969 hearings, the Office of Federal Contract Compliance, in September 1969, found that minority representation in the population of the five-county Philadelphia area was 30% while the minority representation in the six building trades was approximately 1%, and further "that this obvious underrepresentation was due to the exclusionary practices of the unions representing the six trades." 442 F.2d at 173.

4. These findings, "revealing the percentages of utilization of minority group tradesmen in

Associated General Contractors of Massachusetts, Inc. v. Altshuler, supra, presents a similar factual situation. There, the Massachusetts Department of Transportation and Construction, under the authority of gubernatorial Executive Order 74, determined that the federally approved affirmative action plan applicable to the building trades under Executive Order 11246 was inadequate to assure minority representation and that the state thereby needed a stricter plan which would apply to state construction projects. Based not upon any identified past discrimination but instead only upon "an assessment of current availability of minority journeymen, apprentices, and trainees," 490 F.2d at 19, the state required that on any construction project located in any area of high minority

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the six trades compared with the availability of such tradesmen in the five-county area, justified issuance of the order without regard to a finding as to the cause of the situation.... A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action." 442 F.2d at 177.

concentration there be "'a not less than twenty percent ratio of minority employee man hours in each job category,'" and that contractors take "'every possible measure to achieve compliance.'" 490 F.2d at 11. Although this 20% goal was imposed without any timetables and without any proposed termination date, the court added an open-ended termination date: "If, at some future time, racial balance were to be achieved in Boston's construction trades, we assume that there would no longer exist a compelling need for remedial action." 490 F.2d at 18 n.16. Similar to the federally imposed Philadelphia Plan, the state-imposed Massachusetts Plan was not predicated or premised upon findings of past discrimination or even an identification of past discrimination. But, as in Philadelphia, there were administrative findings of severe minority underrepresentation in the building trades.[5]

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5. Those findings "revealed that despite the existence of the federal Boston Plan, minority membership in all of the nineteen participating unions amounted to less than four per cent of union membership, while minorities comprised approximately twenty-three percent of the popu-

The Katzenbach cases present a similar pattern and are illustrative not only of Congress' broad powers to enact race conscious legislation but also of the minimal findings of underrepresentation required to support remedial legislation. These cases upheld the constitutionality of various provisions of the Voting Rights Act of 1965 as a proper exercise of Congressional power. The purpose of the Act, of course, was to enhance the voting rights of minorities.

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lation of Boston." Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9, 13 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). On the basis of these statistical findings and other statistical data, "the district court concluded that racial imbalance does exist in the Boston construction trades and such imbalance is the result of past discriminatory practices on the part of many 'entities' in that industry." 490 F.2d at 18 n.15. The court of appeals elevated the statistical findings and the district court's conclusion yet another step: "It is undisputed that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21. Despite these gratuitous findings, the race conscious Massachusetts Plan was imposed and upheld not on the basis of identified past discrimination but only upon findings of severe minority underrepresentation.

In South Carolina v. Katzenbach, 383 U.S. 301 (1966), South Carolina challenged §4 of the Act on the ground that there had been no unlawful or unconstitutional voting discrimination in the state and on the ground that there was an insufficient nexus between any past violations and the formula used to determine current coverage by the Act. The Court conceded that only in three states had the "federal courts... repeatedly found substantial voting discrimination," 383 U.S. at 329 (footnote omitted), and that the inclusion of South Carolina was based only upon "fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission," 383 U.S. at 329-330 (footnote omitted). Nonetheless, the presence or absence of past constitutional violations was not crucial. "In identifying most evils, Congress obviously may avail itself of information from any probative source." 383 U.S. at 330. Additionally, application of that formula to South Carolina and to other jurisdictions was proper "at least in the absence of proof that they have been free

of substantial voting discrimination in recent years." Id.

The Court in Katzenbach v.Morgan, 384 U.S. 641 (1966), addressed a similar issue: whether §4(e) of the Voting Rights Act, which had the effect of invalidating a New York law requiring English literacy as a prerequisite to voting, was constitutional. New York argued that Congress was without power to invalidate the English literacy requirement, because the law had not been judicially determined to be in violation of the Fourteenth Amendment. The Court rejected this argument, holding that neither judicial nor legislative findings of unconstitutional discrimination were necessary to sustain the remedial race conscious provisions of the Act.

Justice Powell's approval in Bakke of Contractors Association, Altshuler and the Katzenbach cases indicates that he would not apply strict scrutiny review to benign race conscious programs premised upon administrative or legislative findings of severe minority underrepresentation. Regents of the University of Cali-

fornia v. Bakke, 438 U.S. 265, 301-303 (1978).

Here, of course, there is no doubt that the MBE ten percent set aside is premised both upon administrative findings and on legislative findings of chronic minority underrepresentation in government contracting.

In its report to Congress, the U.S. Commission on Civil Rights stated that fewer than 1% of all federal procurement contracts and fewer than 1% of all state and local government contracts were awarded to minority business enterprises.[6] Congress' watchdog, the Government Accounting Office, made nearly identical findings and reported that the SBA's Section 8(a) Program was inadequate to remedy the chronic underrepresentation.[7]

Similar findings were used by Congress to support the need for the MBE ten percent set aside. Representative Parren Mitchell, author of the set aside,

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6. U.S. Commission on Civil Rights, Minority and Women as Government Contractors, at vii (May 1975).

7. GAO Report to Congress: Questionable Effectiveness of the 8(a) Procurement Program at 4 (April 1975).

stressed on the floor of the House that the "average percentage of minority contracts, of all government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them." 123 Cong.Rec. H. 1437 (daily ed. Feb. 24, 1977).[8]

Given the administrative and legislative findings here--findings which were absent in Bakke--it would be inappropriate to review the benign MBE ten percent set aside under the strict scrutiny standard of review. The appropriate standard is the intermediate standard already adopted by Justices Brennan, White, Marshall and Blackmun.

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8. Representative Mario Biaggi supplemented this record:

> "This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been disolved [sic] in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
>
> * * *
>
> "Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be [r]emedied." 123 Cong. Rec. H. 1440 (daily ed. Feb. 24, 1977).

C. The MBE Ten Percent Set Aside Is Necessary To Remedy Substantial and Chronic Minority Underrepresentation in Government Construction Contracting and It Does Not Stigmatize Any Group

Both elements of the intermediate standard of review are met by the MBE ten percent set aside. It is premised upon an important, articulated purpose. And it does not stigmatize any group.

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four members of this Court held that the University's sixteen percent set aside satisfied the first prong of the intermediate review test. As summarized by Justice Brennan, the University's "articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities...." 438 U.S. at 362 (opinion

of Brennan, J., with White, Marshall and Blackmun, JJ.). Here, as in Bakke, the race conscious program serves the important, articulated purpose of remedying past societal discrimination.

The continuing effects of past societal discrimination are undeniable in a society in which "during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination." 438 U.S. at 387 (opinion of Marshall, J.). See also, Sedler, "Beyond Bakke: The Constitution and Redressing the Social History of Racism," 14 Harv.Civ. Rights--Civ.Lib.L. Rev. 133 (1979). The history of extreme discrimination in the skilled building trades--the training ground for future contractors--is especially well documented. In fact, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make exclusion a proper subject for judicial notice." United Steelworkers of America v. Weber, 61 L.Ed.2d 480, 486 n.1 (1979).

As a result of societal discrimina-

tion within the construction industry in particular, minority contractors have had an especially difficult time getting their feet in the door. As Representative John Conyers stated during the debates on the MBE ten percent set aside,

> "minority contractors and businessmen who are trying to enter in on the bidding process...get the 'works' almost every time. The sad fact of the matter is that minority enterprises usually lose out.... [T]hrough no fault of their own, [they] simply have not been able to get their foot in the door." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

Governments at all levels--federal, state, county, municipal--have done little to alter the pervasive effects of this discrimination and exclusion. For the most part, they have subsidized and entrenched past exclusionary patterns.

Recognizing the exclusionary practices of past contracting methods and the perpetuation of past discrimination, Congress also recognized the opportunity presented to alter the record of substantial and chronic exclusion. "In the present legislation before us, it seems to me that we have an excellent opportunity to begin to remedy this situation." Rep. Mitchell, 123 Cong.Rec. H.1437 (daily ed. Feb. 24, 1977). Representative Biaggi echoed the need: "This is a situation that must be [r]emedied." Id. at 1440. He added, in view of the past, that the ten percent figure was "not an unreasonable [percentage]--in fact it is quite modest." Id.

The modest MBE ten percent set aside also satisfied the second part of the test in the intermediate standard in that it neither "stigmatizes any group [n]or ...singles out those least well represented in the political process to bear the brunt of [the] benign program." 438 U.S.

at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

In Bakke, four members of this Court recognized that this "second prong of our test" was "clearly satisfied" by the sixteen percent set aside. In this regard the MBE ten percent set aside is identical.

The set aside obviously does not stigmatize whites. "Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second class citizens because of their color." 438 U.S. at 375 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (emphasis added). And there, of course, is no stigma attributable to the minority beneficiaries of the program especially since there is no question whatsoever about the qualifications of the minority business enterprises. Moreover, there is no stigma associated with the program

since it merely assures access to government contracts; as in Bakke, the "program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." Id. Even the petitioners here, it would seem, would admit that receipt of government contracts involves no stigma but rather enhances economic viability.

Finally, the MBE ten percent set aside does not single out any identified group which is underrepresented in the political process to bear the brunt of this benign program. In fact, with this program, as with the sixteen percent set aside in Bakke, it cannot be "even claimed that [the] program in any way operates to...single out any discrete and insular, or even any identifiable, nonminority group." 438 U.S. at 374 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

Like the sixteen percent set aside in Bakke, the MBE ten percent set aside herein fully satisfies both prongs of the intermediate standard of review applicable to benign race conscious

programs. As such, the MBE ten percent set aside is constitutional.

IV. EVEN IF THE STRICT SCRUTINY STANDARD OF REVIEW WERE APPLICABLE, THE MBE TEN PERCENT SET ASIDE STILL WOULD BE CONSTITUTIONAL

Although the intermediate standard of review is applicable to benign racial classifications, and although the MBE ten percent set aside satisfies the intermediate standard of review, the MBE ten percent set aside also would be constitutional under the strict scrutiny standard of review.

A. Under the Standards Applied by Justice Powell in Bakke, Congress Is Both Authorized and Competent To Find Minority Underrepresentation in Government Contracting and To Devise a Remedy for that Underrepresentation

In his opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell indicated that the strict scrutiny standard of review was not necessarily applicable to benign racial classifications premised upon judicial, legislative or administrative findings of past discrimination

or severe minority underrepresentation. See pp.73 -86, supra. Nevertheless, even where strict scrutiny is applicable, Justice Powell also stated that the strict standard could be satisfied by a classification designed to remedy past practices--for a government "certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." 438 U.S. at 307 (opinion of Powell, J.). Again, however, Justice Powell referred to the necessity of appropriate governmental "findings", and he added the condition that the government body must be authorized and competent to make such findings:

> "[The University] does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any *legislative policy* or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of *legislative mandates and legislatively determined criteria*. *Cf. Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); n.41, *supra*. Before relying upon these sorts

> of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e.g.*, *Califano* v. *Webster*, 430 U.S. at 316-321." 438 U.S. at 309 (opinion of Powell, J.) (footnote omitted; emphasis added).

Justice Powell's views leave no question that Congress--as a matter of constitutional authority--is authorized, capable and competent to make not only findings but also far reaching policy decisions. Mow Sun Wong stands for precisely this proposition. And Webster illustrates the minimal legislative findings necessary to support such policy decisions.

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), this Court struck down a rule of the United States Civil Service Commission which denied aliens permanent employment in the competitive service. The Court's decision was based in part upon the role of the Commission. This occurred because the Commission had defended its discriminatory rule on numerous grounds relating to its pur-

ported role in foreign affairs and in immigration and naturalization. The Court rejected these proffered rationales since neither the President nor the Congress had authorized such a role for the Commission.[1] As the Court made clear, the Commission's role is quite limited and specific:

> "[T]he Commission performs a limited and specific function.
>
> The only concern of the Civil Service Commission is the promotion of an efficient federal service. In general it is fair to assume that its goals would be best served by removing unnecessary restrictions on the eligibility of qualified applicants for employment." 426 U.S. at 114, 115 (footnote omitted).

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1. The Court stated:

> "It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market." 426 U.S. at 114.

The fact that the Commission's asserted interests for its discriminatory rule exceeded its legislatively authorized role was crucial. Indeed, the Court intimated that its result would have been different if the Commission's rule had been directly related to its interests, or if the President or the Congress had mandated the rule:

> "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, *if the rule were expressly mandated by the Congress or by the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.*" 426 U.S. at 103 (emphasis added).

Here, of course, the Court is not faced with a mere rule promulgated by, for example, the Economic Development Administration or by the Small Business

Administration. Instead, as Justice Powell indicated was necessary in Bakke, 438 U.S. at 309 (opinion of Powell, J.), the MBE ten percent set aside is a "legislative mandate [with] legislatively defined criteria. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)."

Justice Powell's reliance on Califano v. Webster, 430 U.S. 313 (1977), as noted, illustrates the minimal legislative findings necessary to support a legislative mandate such as the MBE ten percent set aside. At issue in Webster was a provision of the Social Security Act which allowed a female wage earner, for social security benefit computation purposes, to "exclude from the computation of her 'average monthly wage' three more lower earning years than a similarly situated male wage earner could exclude." 430 U.S. at 315-316. Assuming that the female and the male had earned precisely the same amount of wages in the past, the differential computation "would result in a slightly higher 'average monthly wage' and a correspondingly higher level of old-age benefits for

the retired female wage earner." 430 U.S. at 316.

In Webster, this Court unanimously upheld the challenged provision on the basis of its legislative history. In the Court's view, the legislative history of the challenged provision "reveal[ed] that Congress directly addressed the justification for differing treatment of men and women...and purposefully enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women." 430 U.S. at 318. But the legislative history relied on by the majority to find that the challenged provision had been enacted "to remedy discrimination against women in the job market," 430 U.S. at 319, was a slim reed indeed. First, referring to the legislative history not of the challenged provision enacted in 1961, but of an analogous statutory differential enacted six years earlier, the Court cited a House Report which in turn cited a study by the United States Employment Service in the Department of Labor which "showed that

age limits are applied more frequently to job openings for women than for men and that age limits applied are lower." Id. Second, referring to subsequent legislative history in 1961 which related to the reason for the 1955 statutory differential, the Court cited a statement made by a legislator at a hearing which justified the earlier statutory differential on "the theory...that a woman at that age [62] was less apt to have employment opportunities than a man." Id. Based upon this legislative history --and none other--the Court concluded that "the legislative history is clear that the differing treatment of men and women" was not accidental, "but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." 430 U.S. at 320.

The legislative history here supporting the MBE ten percent set aside of course is considerably more substantial than the two oblique references relied on by the Court to uphold the statutory preference in Webster. During the debates on the MBE ten percent set aside,

Members of Congress repeatedly referred to the need to remedy the high minority unemployment rate[2] and the need to remedy the government's exclusionary history of awarding less than 1% of all government contracts to minority business enterprises.[3] Both of these findings are reiterated in reports made to Congress by agencies authorized to do so.[4] Moreover, Congress presumably was aware of its own failed efforts to enhance the availability of federal contracts to minority business enterprises through the SBA's Office of Minority Business Enterprises and presumably was aware of the similar efforts of President Nixon through Executive Orders 11458, 11518 and 11625. Moreover, Congress, like the

2. 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi); 123 Cong.Rec. S.3910 (daily ed. March 10, 1977) (remarks of Sen. Brooke).

3. *Id.* at 1436-37 (remarks of Rep. Mitchell).

4. *See, e.g.*, GAO Report to Congress: Questionable Effectiveness of 8(a) Procurement Program 32 (April 1975).

judiciary, could take appropriate notice of the extensive discrimination against minorities in the skilled building trades --the training ground for future construction contractors.[5]

That Congress is authorized, capable and competent to make the findings that it made and to try to remedy--minimally--some of that severe underrepresentation and past discrimination is unquestioned. Beyond a shadow of a doubt, Congress' enactment of the MBE ten percent set aside satisfies the criteria deemed necessary by Justice Powell in Bakke. The set aside is, therefore, constitutional.

B. The MBE Ten Percent Set Aside Furthers a Compelling Governmental Purpose and No Less Restrictive Alternative Is Available

Aside from the fact that Congress is authorized, capable and competent to remedy minority underrepresentation or

5. 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Conyers).

past discrimination, the MBE ten percent set aside also is constitutional under strict judicial scrutiny for it meets all the necessary criteria.

As Justice Powell summarized in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), for a classification to pass strict scrutiny, the government "'must show that [1 & 2] its purpose or interest is both constitutionally permissible and substantial, and that [3] its use of the classification is "necessary. . . to the accomplishment" of its purpose or the safeguarding of its interest.'" 438 U.S. at 305 (opinion of Powell, J.) (citations omitted) (ellipsis in original). Additionally, as Justice Brennan pointed out in Bakke, a suspect classification can be justified "even then, [4] only if no less restrictive alternative is available." 438 U.S. at 357 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (footnote omitted). The MBE ten percent set aside meets all of these criteria.

1. The Purpose is Constitutionally Permissible

As discussed at pp.94-103, supra, there is no question that Congress has the power to enact race conscious remedial legislation. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); see also, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Moreover, it has been firmly settled that Congress has the "power to fix the terms on which its money allotments to the [States] shall be disbursed." Lau v. Nichols, 414 U.S. 563, 569 (1974).

Congress' purpose in enacting the MBE ten percent set aside was, inter alia, to "begin to remedy" the exclusion of minority contractors from government contracts. 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). That purpose is undisputedly permissible.

2. The Purpose Is Substantial

As Justice Marshall stated in Bakke,

the position of racial minorities in American society today "is the tragic but inevitable consequence of centuries of unequal treatment." 438 U.S. at 395 (opinion of Marshall, J.). "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America." 438 U.S. at 401 (opinion of Marshall, J.). "And in order to get beyond racism, we must first take account of race." 438 U.S. at 407 (opinion of Blackmun, J.).

The MBE ten percent set aside amendment, of course, was directed at the admirable purpose of remedying the exclusion of minority contractors from lucrative government contracting. See pp. 26-37, 55, 89-92, supra. But the underlying purposes are even more substantial. As summarized by Representative Mitchell:

> "We cannot continue to hand out survival support programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system." 123 Cong.Rec. H.1436-37 (daily ed. Feb. 24, 1977).

Representative Biaggi offered similar reasoning:

> "This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been disolved [sic] in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
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> * * *
>
> "This amendment will go a long way toward helping to achieve [economic] parity and more importantly to promote a sense of economic equality in this Nation." *Id.* at 1440.

On the Senate side, the reasoning was virtually identical. As Senator Brooke explained to that chamber, "minority businesses' work forces are principally drawn from communities with severe and chronic unemployment.... Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

Thus, as these legislators recog-

nized, it is clear that the purposes of the MBE ten percent set aside are not only substantial, they are of overwhelming importance.

3. The MBE Ten Percent Set Aside Is Necessary to the Accomplishment of Congress' Purposes

Year after year after year, governments have awarded fewer than one percent of all procurement contracts to minority business enterprises. This pattern was not about to change unless Congress made it change. The MBE ten percent set aside was absolutely necessary in order "to begin to remedy this situation." 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). The remedy of course was not very extensive. The ten percent figure "in fact is quite modest." Id. at 1440 (remarks of Rep. Biaggi). Nonetheless, the ten percent figure was absolutely necessary to begin to accomplish Congress' purposes.

4. There Is No Less Restrictive Alternative Available

In enacting the MBE ten percent set

aside, Congress was not making its first attempt to remedy the exclusion of minority businesses from government contracting. Rather, for a decade Congress had been pouring money into the Small Business Administration and into the SBA's Office of Minority Business Enterprise. By the mid-1970s, it became clear that the SBA's efforts were too insubstantial and too ineffectual to remedy the government's past patterns.

In reports made to Congress by the U.S. Commission on Civil Rights[6] and by the Government Accounting Office,[7] the virtually total ineffectiveness of the SBA programs and of similar programs was thoroughly documented. Similar findings were made in late 1976 by the House of Representatives Committee on Small Business.[8] It became evident to Congress

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6. U.S. Commission on Civil Rights, Minorities and Women as Government Contractors (May 1975).

7. *See* note 4 *supra*.

8. House Comm. on Small Business, Summary of Activities, H.R. No. 94-1791, 94th Cong., 2d Sess. (1977).

that a more substantial program of direct government contracts through a minority set aside was the only feasible means of accomplishing Congress' purpose.

When Representative Parren Mitchell introduced the ten percent set aside amendment, he capsulized the problems faced by minority contractors even with the assistance of the SBA/OMBE programs:

> "Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.' That denial is made absolutely clear when one looks at the amounts of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts." 123 Cong.Rec. 1436-37 (daily ed. Feb. 24, 1977).

Senator Brooke was equally emphatic about the absolute need, based on past experience, for the ten percent set aside. It is "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

To Congress, which enacted the ten percent set aside without dissent, there was no less restrictive alternative available to accomplish its purpose. The MBE ten percent set aside "is the only way we are going to get the minority enterprises into our system." Id. (emphasis added). It is, therefore, constitutional.

CONCLUSION

Racial minorities have traditionally been excluded from benefitting directly from government procurement programs through a complex network of events, ranging from overt racial discrimination to more subtle forms of exclusion traceable to discrimination in access to educational facilities and to adequate financial backing. The short-term result of excluding more than fifteen percent of our population from the procurement pie has been to create a substantial competitive advantage for white-owned firms seeking to profit from government procurement. Instead of a market share established by competition, white owned businesses have enjoyed a monopoly of the procurement trade attributable not to superior economic efficiency, but to the artificial exclusion of minority business enterprises as prospective competitors. Congress, in enacting the MBE set aside, sought merely to reconstruct the competitive picture as it would have existed but for the historic

exclusion of minorities from government procurement programs. In recognizing and declining to perpetuate a skewed competitive picture attributable to past racism, Congress was engaged in seeking to eliminate the current effect of past racially discriminatory procurement practices. Since petitioners have neither a moral nor a legal claim to a status quo built on racial exclusion, the decision of the Court of Appeals for the Second Circuit should be affirmed.

Dated: October 8, 1979

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE*

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OCTOBER TERM, 1979

No. 78-1007

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Court of Appeals for the Second Circuit

BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS AMICUS CURIAE

Interest of Amicus

The Asian American Legal Defense and Education Fund is a non-profit corporation established under the laws of the States of California and New York in 1974 in order to assist Asian Americans throughout the nation in the protection of their civil rights through the prosecution of lawsuits and the dissemination of public information. Amicus has found that much of its work concerns discrimination on the basis of race and national origin in the job market and economic opportunity generally as a result of the historic exclusion of Asians from the mainstream of American business life and the legacy of overt economic discrimination sanctioned by law. It is the experience of amicus that affirmative action programs such as the Congressional minority business enterprise set-aside program upheld by the court below are necessary to overcome burdens on equal opportunity for Asian Americans.*

*The parties have consented to the filing of this brief amicus curiae, and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

The minority set-aside provision of the Public Works Employment Act of 1977 was enacted as a means of bringing minority businesses, including Asian American enterprises, into full and equal participation in the economic life of the nation. The legislation is one of a set of recent Congressional programs specifically designed to redress documented discriminatory exclusion of minority firms from dominant business activity. This exclusion of Asian Americans, as is true of other racial minority groups, is a vestige of prior legal restraints which limited and relegated Asians to marginal areas of economic endeavor. It was therefore appropriate for Congress to take steps to overcome the continuing effects of prior discrimination in an area of great national concern pursuant to the enforcement powers conferred by the Thirteenth and Fourteenth Amendments.

ARGUMENT

I. THE PURPOSE OF THE SET-ASIDE PROVISION IS TO REDRESS THE EXCLUSION OF MINORITY BUSINESSES, INCLUDING ASIAN AMERICAN ENTERPRISES, FROM THE MAINSTREAM OF AMERICAN ECONOMIC LIFE.

The Public Works Employment Act of 1977, 42 U.S.C. §§ 6701 et seq., was passed by Congress as

an antirecession measure targeted for areas of high unemployment. Section 103(f)(2) of the Act, 42 U.S.C. § 6705(f)(2), provides, in pertinent part, that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises," i.e., enterprises owned in substantial part by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." The set-aside provision was proposed "to strengthen the nondiscrimination provision contained in the ...Act", section 110 of the Public Works Act of 1976, 42 U.S.C. § 6709, [1] in order (a) to provide minority businesses "a fair share" of construction contracts and related business to be generated by the Act[2] and (b) to fight unemployment in minority areas.[3]

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1. Hearings Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation, 95th Cong., 1st Sess., 939 (1977) (Rep. Conyers).

2. 123 Cong. Rec. H 1436 (daily ed. Feb. 24, 1977) (Rep. Mitchell).

3. 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Sen. Brooke); 123 Cong. Rec. H 1440 (daily ed. Feb. 24, 1977) (Rep. Biaggi).

The proponents of the legislation made clear that the set-aside provision was part and parcel of a decade of substantial federal efforts to encourage minority business through direct grants, loans, loan guarantees, and procurement of goods and services.[4] On March 5, 1969, President Nixon issued Executive Order 11458 which established the Office of Minority Business Enterprise under the Department of Commerce to develop and coordinate expanded federal efforts. The agency with the greatest implementation responsibility was the Small Business Administration ("SBA"), which in 1972 spent over one-half of federal funds allocated for minority business assistance. Among the programs administered by the SBA is a set-aside program for minority federal procurement contracts pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), which was specifically cited as precedent for the public works act set-aside provision.[5] Other federal agencies with programs to assist minority businesses, including, in some instances, set-aside programs, were the Commerce

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4. See, e.g., 123 Cong. Rec. H 1437 (daily ed. Feb. 24, 1977) (Rep. Mitchell); 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Sen. Brooke).

5. Id.

Department's Economic Development Administration, the Department of Housing & Urban Development, the Department of Health, Education & Welfare, the Department of the Interior, the Department of Transportation, and the Federal Aviation Administration, as well as state and local agencies.[6]

Indeed, the public works set-aside provision was expressly intended to supplement and strengthen existing federal minority business programs.[7] Representative Mitchell, the author of the provision, pointed out that only 1 percent of all government contracts went to minority businesses and that existing federal programs had not yet been able to increase the amount.[8] Congress was well aware of

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6. See, U.S. Dept. of Commerce, Office of Minority Business Enterprise, Report of the Task Force on Education and Training for Minority Business Enterprise 47-75 (1974) (hereinafter "OMBE Task Force Report"); U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors 102-104 (1975); see also, S. Doctors & A. Huff, Minority Enterprise and the President's Council 17-30 (1973).

7. 123 Cong. Rec. H 1436-37 (Rep. Mitchell), H 1440 (Rep. Biaggi) (daily ed. Feb. 24, 1977); 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Sen. Brooke).

8. Id.

the need for the legislation because the problem of "a business system which has traditionally excluded measurable minority participation" was fully documented in reports of federal agencies with responsibilities for promoting minority business.[9] Thus, while minority persons were 17 per-

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9. See, e.g., House Subcomm. on Small Business Admin. Oversight and Minority Business Enterprise, Summary of Activities of the Comm. on Small Business, 94th Cong., 182-183 (1976):

> "The very basic problem...is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular. However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them."

Cited by the court below, 584 F.2d 600, 606 (2d Cir. 1979).

cent of the nation's population, they control only 4 percent of the total number of business enterprises. Gross receipts of all minority-owned businesses in 1969 were less than 1 percent of the total receipts for all American businesses and roughly equal to the 1972 sales of the General Electric Company alone, and the combined assets of minority-owned businesses equalled 0.3 percent of all business assets in 1971.[10/]

The situation of Asian American business enterprises is comparable to that of other minority firms. Asian American businesses comprise 0.5 percent of total businesses, and the typical Asian American business is a sole proprietorship without paid employees engaged in retail trade or personal service with annual gross receipts of under $25,000.[11/] One-third of all Asian American firms

10. OMBE Task Force Report at 17-19; see generally, U.S. Dept. of Commerce, Bureau of the Census, Minority-Owned Business: 1969 1-2 (1971); U.S. Dept. of Commerce, Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises, Minority-Owned Business, MB 72-4 (1975).

11. U.S. Department of Commerce, Office of Minority Business Enterprise, Amsun Associates, Socio-Economic Analysis of Asian American Business Patterns 5-26 (1977) (hereinafter "OMBE Study"); see generally, U.S. Department of Commerce, Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises, Minority-Owned Businesses: Asian Americans, American Indians, and Others (1975).

had less than $5,000 in gross receipts in 1972, and a little over two-thirds had gross receipts of under $25,000. 63 percent of all Asian American firms are engaged in retail trade and personal service (which includes laundry, cleaning and garment services, barber shops, beauty shops, etc.) business. The nearly 90 percent of Asian American businesses that are sole proprietorships account for only about one-half of the receipts of all Asian American businesses. More than three-fourths of Asian American businesses operate without paid employees. In 1972, 61 percent of all Asian American employer firms had less than five employees and 99 percent had less than fifty employees; the 0.5 percent of Asian American employer firms which had more than 100 employees are still considered small businesses by the SBA.

In particular, Asian American construction contractors are typical of minority contractors. Specific problems of minority construction contractors were cited in the debate on the public works set-aside provision: Minority firms could not compete successfully against the older, larger, and more established non-minority firms, and minorities were unfamiliar with bidding procedures and often needed assistance in handling the administrative work required under federal

contracts.[12] Only 4 percent of Asian American businesses are engaged in construction work in contrast to 10 percent of all American businesses. Average receipts per Asian American firm were half of total American firms, and three-quarters of the Asain American construction businesses were sole proprietorships with no paid employees. Employer firms are small, averaging eight employees per firm.[13]

The degree of discrimination encountered by minorities in the construction industry is so great that it had "(j)udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice". United Steelworkers of America v. Weber, __ U.S.__, 99 S. Ct. 2721, 2725 n.1 (1979). Asians, like other minorities, have been unable to enter skilled trades in the construction

12. 123 Cong. Rec. H 1437 (Rep. Mitchell), H 1439 (Rep. Harsha), H 1440 (Rep. Conyers) (daily ed. Feb. 24, 1977); see generally, U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors (1975); U.S. Dept. of Labor, Manpower Admin., R. Glover, Minority Enterprise in Construction (1977); U.S. Gen'l Accounting Office, Minority Firms on Local Public Works Projects--Mixed Results (1979).

13. OMBE Study at 39, 52-53.

industry in any appreciable numbers in areas of substantial Asian population because of racially exclusionary policies of construction unions; indeed, they are practically invisible, see, e.g., United States v. Operating Engineers, 4 F.E.P. Cases 1088 (N.D. Cal. 1972). One study found that Asian participants in the Federal Highway Administration highway construction-related trades and apprenticeship training, who successfully completed their training, nevertheless were unable to enter apprenticeship programs because of racial discrimination against Asians within the construction industry in California.[14] Another striking example is the recent protracted efforts of Asian American groups and government agencies to convince builders and contractors to employ Asians in trainee construction jobs at Confucius Plaza, a federally-supported residential and commercial complex in the heart of New York City's Chinatown.[15]

14. U.S. Department of Transportation, Federal Highway Admin., F. Wu, P. Chen, Y. Okano, P. Woo, Involvement of Asian Americans in Federal-Aid Highway Construction (1978).

15. See, New York State Advisory Comm. to the U.S. Comm'n on Civil Rights, The Forgotten Minority: Asian Americans in New York City 28-29 (1977).

II. ASIAN AMERICANS ARE STILL SUBJECT TO THE VESTIGES OF PRIOR ECONOMIC DISCRIMINATION IMPOSED BY LAW.

Asian Americans have been subjected to state-imposed discrimination since their earliest arrival in the mid-1800's. The early history of Asian American wage earners and businessmen reflects their participation in diverse occupations and industries. However, in each area in which Asian Americans became competitive in the pursuit of their livelihood with the white population, prohibitive statutes and ordinances were enacted or discriminatorily applied against Asians: indeed, the history of Asian Americans in the western states, to which they first immigrated, is largely the history of legally-imposed exclusion from the mainstream of business life and restriction to separate and lesser economic pursuits.[16/] Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which this Court struck down an ordinance regulating laundry buildings which San Francisco authorities administered "with an evil eye and an unequal hand" to exclude Chinese from an entire occupation, and for

16. The history of legally-enforced discrimination and exclusion of Asians is set forth in M. Coolidge, Chinese Immigration (1909) (hereinafter "Coolidge"); E. Sandmeyer, The Anti-Chinese Movement in California (1939) (hereinafter "Sandmeyer"); F. Chuman, The Bamboo People: The Law and Japanese Americans (1976) (hereinafter "Chuman"). See generally P. Murray, States' Laws on Race and Color (1951).

which "no reason for it exists except hostility to the race and nationality to which petitioners belong," id. at 374, was but one, and by no means the most invidious, part of the structure of racial discrimination and exclusion sanctioned by law.

The earliest Asian immigrants were the Chinese who began arriving in substantial numbers in 1847. The Chinese arrived as contract laborers to work in the mines and later on the railroads. In the 1870's, following the completion of the railroads, Chinese entered a broad range of agricultural and manufacturing industries. They were also self-employed as laundrymen, domestics, and peddlers.[17/] However, Chinese miners were subject to a foreign miner's tax enforced only on them,[18/] and San Francisco imposed a vehicle tax on Chinese laundrymen.[19/]

17. The history of the Chinese in the West is set forth in Coolidge, supra note 16; Sandmeyer, supra note 16; S. Lyman, The Asian in the West 9-26 (1970); S. Lyman, Chinese Americans (1974); see also P. Chiu, Chinese Labor in California, 1850-1880 (1967); I. Light, Ethnic Enterprise in America: Business and Welfare Among Chinese, Japanese and Blacks (1972).

18. Foreign Miners' License Tax, Act of Apr. 13, 1850, ch. 97, § 1 et seq., 1850 Cal. Stat. 221. See Coolidge at 36.

19. Municipal Reports, 1871-72, 550; see Sandmeyer at 52.

Chinese peddlers were prohibited from using poles and baskets, a traditional method of transporting goods and food.[20] The California State Constitution of 1879 expressly forbade the employment of any Chinese, directly or indirectly, by any California corporation or governmental entity.[21] While that provision did not survive constitutional challenge, other prohibitive statutes and ordinances were widely enacted throughout the western states.[22] What discriminatory laws and court rulings failed to achieve, physical violence and anti-Chinese sentiment completed. Finally in 1882 the first Chinese Exclusion Act was passed prohibiting further immigration and setting off a policy of curtailment which continued into the middle of this century.[23]

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20. S. Lyman, The Asian in the West 23 (1970).

21. California Constitution of 1879, art. XIX, §§ 2-3. See Sandmeyer at 71-74.

22. See, e.g., Idaho Constitution of 1890, art. 13, § 5 (public works); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (San Francisco laundry building ordinance); In re Hong Yen Chang, 84 Cal. 163 (1890) (attorneys).

23. Chinese Exclusion Act, 22 Stat. 58 (1882). See The Chinese Exclusion Case, 130 U.S. 581 (1889).

Japanese immigration began in the 1860's but did not reach significant numbers until 1891. Like the Chinese who came before them and in partial response to the labor shortage brought about by the prohibitions against further Chinese immigration, the Japanese also entered the agricultural, mining and railroad industries. In Colorado and Utah they branched out into the smelting and refining industries and in the Northwest, into the lumbering industries. The Japanese also engaged in the fishing and canning industries.[24] However, numerous "alien land laws" were passed to prohibit the Japanese from owning any legal interest in real property,[25] and laws were passed prohibiting Japanese from engaging in commercial fishing by

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24. The history of the Japanese in California is set forth in Y. Ichihashi, Japanese in the United States (1932); R. Daniels, The Politics of Prejudice (1962); H. Kitano, Japanese Americans: The Evolution of a Subculture (1969).

25. See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923) (Washington statute); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923); Cockrill v. California, 268 U.S. 258 (1924); Oyama v. State of California, 332 U.S. 633 (1948). See generally M. Konvitz, The Alien and the Asiatic in American Law 157-70 (1946); McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947); Ferguson, The California Alien Land Law and the Fourteenth Amendment, 35 Cal. L. Rev. 61 (1947).

forbidding the issuance of fishing licenses or the sale of fish by Japanese.[26] From 1923 to 1933 bills aimed at the Japanese were proposed in virtually every session of the California legislature to prohibit the employment of aliens in government and by contractors for public work projects.[27] The uprooting of Japanese American families under Executive Order 9066 wiped out their agricultural, fishing and small business enterprises. Although the economic and personal losses can never be fully recompensed, bills proposing economic redress for Japanese American internees are being considered by Congress.[28] Koreans, Pilipinos, and later Asian immigrants arriving after the Chinese and Japanese were subject to similar official treatment.

While the express legal structure and sanction that "put the weight of government behind racial

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26. Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); T. Abe v. Fish and Game Comm'n, 9 Cal. App. 2d 300, 49 P.2d 608 (1935).

27. See Chuman at 111 n.10 (and bills cited therein).

28. See, e.g., S. 1647, 96th Cong., 1st Sess. (1979).

hatred and separatism"[29] has faded in the modern postwar era, its effects have not been eliminated root and branch. Asian American business activity remains concentrated in the marginal areas to which they were relegated by state-imposed discrimination, small retail trade and personal service enterprises, see supra. Many of these enterprises operate in China'owns and Little Tokyos throughout the nation.[30]

III. THE SET-ASIDE PROVISION OF THE PUBLIC WORK EMPLOYMENT ACT OF 1977 IS A NECESSARY AND PROPER MEANS OF PROMOTING THE DEVELOPMENT OF MINORITY BUSINESSES.

Senator Brooke, the Senate sponsor, explained why the set-aside provision is "entirely proper, appropriate and necessary."

> It is necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool.

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29. University of California Regents v. Bakke, 438 U.S. 265, 357-58 (1978) (Brennan, J.)

30. See generally U.S. Dept. of Health, Education & Welfare, Urban Associates, Inc., A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census, Vol. II: Asian Americans (1974) (HEW Publ. No. (OS) 75-121).

> It is a proper concept, recognized for example in this committee's bill which sets aside up to 2-1/2 percent for projects requested by Indians or Alaska Native villages. And, the Federal Government, for the last 10 years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the set-aside concept as a legitimate tool to insure participation by hitherto excluded or unrepresented groups.
>
> It is an appropriate concept, because minority businesses' work forces are principally drawn from residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens. Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country.31/

Experience to date in implementing the Public Works Employment Act set-aside provision has shown that it has enabled new minority firms to develop and existing ones to survive, it has provided minority firms with valuable technical and managerial assistance and experience, and it has exposed non-minority prime contractors to a wider range of bidders, including minority firms, for subcontract work.32/

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31. 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977).

32. U.S. Gen'l Accounting Office, Minority Firms on Local Public Works Projects--Mixed Results 13-15 (1979). Although not without administrative problems, the set-aside program has resulted in benefits to minority firms.

The effects of the set-aside provision will be felt by minority businesses outside of the construction industry as well. Public works grants include contracts for engineering, landscaping, accounting, guard services, other professional or supervising services, and supplies. Just as minority construction firms can be expected to stimulate the hiring and employment of minority construction workers, they can be also expected to stimulate minority businesses engaged in other secondary and related industries.33/

Amicus respectfully submits that the set-aside provision is a constitutionally permissible exercise of Congressional power to enforce the guarantees of the Thirteenth and Fourteenth Amendments and a proper exercise of the spending power. Congress has broad powers both to determine the means by which the intent of the post-Civil War amendments are enforced, Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966), and to set the terms upon which its monetary allotments are conditioned. Lau v. Nichols, 414 U.S. 563, 569 (1974). Certainly, the post-Civil War amendments were not intended to

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33. See 123 Cong. Rec. S 3910 (daily ed. Mar. 10, 1977) (Senator Brooke); Economic Development Admin., Guidelines for 10% Minority Business Participation in Local Public Works Grants (1977).

prohibit measures designed to remedy the effect of the nation's past treatment of racial minorities. The Congress that passed the Thirteenth and Fourteenth Amendments and early civil rights acts is the same Congress that passed the 1866 Freedmen's Bureau Act, which provided many of its benefits and protections only to black freedmen then subject to the Black Codes, University of California Regents v. Bakke, supra, 438 U.S. at 396-98 (Marshall, J.).

The Congressional set-aside provision, like the affirmative action plan in United Steelworkers of America v. Weber, supra, 99 S. Ct. at 2730, was "designed to break down old patterns of racial segregation and hierarchy." The purposes of the set-aside provision mirror those of the Thirteenth and Fourteenth Amendments. The specific inclusion of Asian American business enterprises in the set-aside program was appropriate because the protections of the post-Civil War amendments and the civil rights acts were specifically intended to protect the rights of "Chinese coolie labor" as well as black freedmen, Slaughter House Cases, 83 U.S. 36 (1873), and that "the application of the Amendment to the Chinese race was considered and not overlooked." United States v. Wong Kim Ark, 169 U.S. 649, 697-99 (1898). Again like the affirmative action program permitted in Weber, supra, the

the set-aside provision "does not unnecessarily trammel the interests of the white employees" and contractors, 99 S. Ct. at 2730, since the set-aside was for only 0.25 percent of federal funds expended yearly on construction work in the United States and the burden of being dispreferred was thinly spread among nonminority businesses, comprising 96 percent of the construction industry. Fullilove v. Kreps, 584 F.2d at 607-608. Last, the public works employment set-aside program is "a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Weber, supra, 99 S. Ct. at 2730.

CONCLUSION

For the reasons above, the opinion and judgment of the Second Circuit should be affirmed.

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes former Attorneys General, past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past sixteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, access to government services, the administration of justice, and law enforcement.

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* The parties' letters of consent to the filing of this brief are being filed with the clerk pursuant to Sup. Ct. Rule 42(2).

The Lawyers' Committee and its local committees, affiliates, including the San Francisco Lawyers' Committee for Urban Affairs, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief from private and public discrimination. In this case, Congress itself has come to grips with the effects of such discrimination, manifested by insignificant minority business enterprise (hereinafter at times "MBE") participation in federally funded construction work, by setting aside for MBE's ten percent of the funds allocated to one short-term federal program. The Lawyers' Committee, over the years, has strongly endorsed vigorous action by the executive and legislative branches to remedy discrimination and its effects. We believe that the MBE set-aside at issue in this case was a reasonable congressional response to the historic exclusion of MBE's from federally funded construction contracts, and we believe it important for this Court to affirm the power of Congress to respond as it did to this discrimination.

The Lawyers' Committee has previously addressed the issue of race-conscious affirmative action programs in its amicus briefs in Defunis v. Odegaard, 416 U.S. 312 (1974), University of California Regents v. Bakke, 438 U.S. 265 (1978), and United Steelworkers v. Weber, 99 S.Ct. 2721 (1979). Because the issues presented by this case are vitally important to the realization of the goal of equal opportunity for minorities, and to the power of Congress to deal with discrimination against minorities, the Committee files this brief amicus curiae for the assistance of the Court.

STATEMENT OF THE CASE

Section 42 U.S.C. §6705(f)(2)[1/] established a 10 percent set-aside for minority businesses in funds allocated pursuant to the Public Works Employment Act of 1977, Pub. L. No. 95-28, title I, May 13, 1977, 91 Stat. 116 (hereinafter "1977 PWEA"), amending Public Works Employment Act of 1976, Pub. L. No. 94-369, title I, July 22, 1976, 90 Stat. 999 (hereinafter "1976 PWEA"). These anti-recessionary Acts funded the construction of public buildings and other public works on the basis of grant applications submitted by state and local governments, in order to stimulate the economy through public spending and alleviate unemployment, particularly in the hard-pressed construction industry, H.R. Rep. No. 94-1077, 94th Cong., 2d Sess. 1-2 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 1746, 1746-47.

The challenged provision (hereinafter at times "1977 MBE provision") mandated the Secretary of Commerce, unless she determined otherwise, to require from government recipients of these funds satisfactory assurance that 10 percent of each public works grant would be spent for minority business enterprises. MBE's were defined as businesses at least 50 percent of which were owned (or publicly owned businesses the stock of which was at least 51 percent owned) by United States citizens who were Negroes, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts.

This provision was one of several refinements in the funding requirements

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1/ The 1977 MBE provision reads:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts. 42 U.S.C. §6705(f)(2) (1976 & Supp. I 1977).

which Congress made when, in the 1977 PWEA, it extended the 1976 PWEA public works program for another year and added an additional 4 billion dollars in program funding to the 2 billion dollars originally authorized.

Versions of the 1977 MBE provision were introduced as floor amendments to the 1977 PWEA by Congressman Parren Mitchell of Maryland in the House of Representatives, 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977), and by Senator Edward Brooke of Massachusetts, and others, in the Senate, 123 Cong. Rec. S3909-10 (daily ed. March 10, 1977). After debate, versions of the MBE provision were accepted by both Houses.

The House version included a clarifying amendment offered by Representative Roe, 123 Cong. Rec. H1438 (daily ed. Feb. 24, 1977), which established that the 10 percent requirement was to be waived where the unavailability of MBE's made the 10 percent requirement infeasible. The Conference Report adopted the House version, emphasizing that "[t]his provision shall be dependent on the availability of minority business enterprises located

in the project area." H.R. Rep. No. 95-230, 95th Cong., 1st Sess. 11, reprinted in [1977] U.S. Code Cong. & Ad. News 168, 170. The 1977 PWEA, as amended, was enacted into law on May 13, 1977.

Petitioners brought suit for declaratory and injunctive relief in the United States District Court for the Southern District of New York on November 30, 1977, on the grounds that the 1977 MBE provision employed a racial classification in violation of the fifth and fourteenth amendments of the United States Constitution and of various statutes, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d et seq. (1976). The district court consolidated for hearing petitioners' motion for a preliminary injunction and the trial on the merits, and held that hearing on December 2, 1977. The court found the 1977 MBE provision constitutional and therefore dismissed the complaint. 443 F. Supp. 253 (S.D.N.Y. Dec. 19, 1977). The court of appeals affirmed on the merits. 584 F.2d 600 (2d Cir. 1978). This Court granted certiorari on May 21, 1979. 47 U.S.L.W. 3760.

SUMMARY OF ARGUMENT

In enacting the 1977 MBE provision, Congress built on foundations it had laid over a period of decades, and the provision cannot be fairly considered in isolation from those foundations. In the course of its oversight of various government programs, including the Small Business Act, federal revenue-sharing, federal assistance to construction projects, and the Railroad Revitalization and Regulatory Reform Act, Congress had been fully informed of conditions which justified the 1977 MBE provision. For Congress had learned of the existence of discrimination against minorities in the construction industry and in state and local government procurement programs. It had learned that minority businesses had, as a result, been excluded in dramatic fashion from participation in government contracts. Congress was, furthermore, aware of the particularly severe effects of the recession in 1977 on minority individuals and minority businesses, and was aware that these problems had to be addressed quickly and decisively.

Congress' accumulated experience with the problems of minority businesses

also made it aware that methods other than a minority set-aside would be ineffective in responding to this historic discrimination and to the plight of minorities during the 1977 recessionary period.

Because the 1977 MBE provision was limited to federally assisted state and local construction projects, it would be disingenuous to argue that the reasons for the provision are obscure. The historic discrimination against minorities in the construction industry, which is so notorious that it is an appropriate subject for judicial notice, and the exclusion of minorities from government contract work provide a substantial foundation for the provision. Congress has broad constitutional authority to respond to such conditions in the exercise of its spending power, and by virtue of the enforcement clauses of the thirteenth and fourteenth amendments. Congress' response was temperate and rational: the 1977 MBE provision was limited to a small portion of government contract work, could be waived where infeasible, and lasted for only a limited period of time. Congress did not abuse its authority.

ARGUMENT

I. ONLY THE POWER OF CONGRESS TO REMEDY PAST AND PRESENT DISCRIMINATION BY MEANS OF A CIRCUMSCRIBED MINORITY SET-ASIDE PROVISION IS AT ISSUE.

It is essential to state clearly what this case involves. It does not involve the authority of a federal or state administrative agency, or of a state legislative body, to promulgate a minority set-aside provision. It calls into question only the authority of Congress, the body explicitly charged with enforcement of the thirteenth and fourteenth amendments. This case also does not involve a set-aside provision relating to an area of economic activity as to which evidence of discrimination and exclusion of minorities was lacking. To the contrary, Congress was fully informed of the specific problems addressed by the 1977 MBE provision. This case also does not involve a federal program depriving white contractors of existing federal benefits. Although some public works funds were set aside for MBE's, as part and parcel of the same program, 3.6 billion additional dollars were made

fully available to all contractors. Finally, this case does not involve a permanent minority set-aside, or even one which would continue in the absence of further congressional action. This particular set aside was limited to the term of the 1977 PWEA.[2/]

Since racial classifications preferring minorities are not per se unconstitutional, University of California Regents v. Bakke, 438 U.S. 265, 272, 320 (1978) (Powell, J.); id. at 324-25 (Brennan, J.), the question posed by this case is narrower and significantly less difficult than any questions future cases may pose.

2/ Because the 1977 MBE provision was limited in this fashion, because petitioners chose not to seek damages, and because Congress in 1978 enacted a different set-aside provision, see pp. 49 to 56 infra, so that there is no "reasonable expectation" to believe that petitioners will again be subject to terms like those contained in the 1977 MBE provision, cf. First National Bank of Boston v. Bellotti, 435 U.S. 765, 774-75 (1978), there is a substantial question of mootness. This brief does not address that issue, which we believe will be discussed at length in Respondent Secretary of Commerce's brief.

II. CONGRESS EXERCISED ITS POWER ONLY AFTER LONG AND DETAILED INVESTIGATION, DEBATE AND REMEDIAL EXPERIMENTATION, DURING WHICH IT HAD FOUND THAT WIDESPREAD DISCRIMINATION AGAINST MINORITIES EXISTED IN THE CONSTRUCTION INDUSTRY AND IN THE LETTING OF GOVERNMENT CONTRACTS, AND THAT THE SET-ASIDE PROVISION WOULD ENHANCE THE WELL-BEING OF THE ECONOMY.

A. The Floor Debates On The 1977 MBE Provision Capsulized The Facts Which Justified Its Passage.

Petitioners' description of the 1977 MBE provision ignores many of the statements made in the congressional debate on the provision, as well as other very substantial evidence supporting the need for such a provision. Petitioners argue that the "legislative history of the PWEA is completely devoid of any legislative findings or any other material sufficient" to sustain the MBE provision. They characterize the MBE provision as nothing more than an unreasoned "after-thought" to give MBE's a "'share of the action'" without justification. Brief for Petitioners at 15; see Brief for Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated

General Contractors of America, Inc. ("Building Contractors' Brief") at 13.

Representative Mitchell in fact directed Congress' attention to the dismal history of federal programs designed to create and support minority businesses, and to the historical denial of government contracts to minority businesses. He did not, as petitioners suggest, blatantly urge without justification that minority businesses should receive a "share of the action". Mitchell argued that the woeful record of all of these existing federal programs, of which Congress was well aware, see pp. 27 to 56 infra, would continue unless Congress mandated the disbursement of federal monies to minority enterprises. Unless that were done, MBE's would be unable to enter the economic mainstream, and "support survival" programs would continue to be a way of life for many segments of our economy:

> Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a

piece of the action, the Federal Government is absolutely remiss. All it does is say that, "We will create you on the one hand and, on the other hand, we will deny you." That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts.

In the present legislation before us it seems to me that we have an excellent opportunity to begin to remedy this situation.

. . .

...[S]etting aside contracts for minorities...is the only way we are going to get the minority enterprises into our system.

. . .

...This is the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to pull down deficits in spending; we are going to be able to end certain programs which are merely support survival programs for people which do not

contribute to the economy. I support those programs because at present we have nothing else to offer. 123 Cong. Rec. H1436-37 (daily ed. Feb. 24, 1977).

Representative Mitchell ascribed the problems of minority businesses not only to their relative newness and small size, attributable to prior discrimination, see, e.g., pp. 32 to 64 infra, but also to the resistance of government contracting agencies which made it necessary to mandate a minority enterprise set-aside:

> [MBE's] are so new on the scene, we are so relatively small that every time we go out for a competitive bid, the larger, older, more established companies are always going to be successful in underbidding us. Id. at H1437.
>
> ...[E]very agency of the Government has tried to figure out a way to avoid doing this very thing [of letting contracts to MBE's]. Believe me, these bureaucracies can come up with 10,000 ways to avoid doing it. That is why I am insisting it be mandated. Id. at H1438.
>
> ...I think we must look at other States and cities around this country that have not really addressed the problem at all and do not have any lever on which to hang an operation designed to begin to redress this grievance [of not

letting contracts to MBE's] that has been extant for so long.

...By setting the tone at the Federal level,...what we do in terms of these local political subdivisions is to give them the added impetus to do those things which are right and fair. Id. at H1440.

Other congressmen recognized the fundamental fairness of the amendment, stating that it would mitigate the latent inequities of the 1977 PWEA for minority businesses and workers. Minorities had suffered disproportionately in the recessionary period which continued into 1977. They had gotten "the 'works' almost every time" by being denied participation in public works projects. One reason was the governmental bidding process, which was structured in a manner effectively excluding minorities. This was true in the experience of two congressmen:

> This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been dissolved in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
>
> . . .

> ...Yet without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense of economic parity. Id. (remarks of Rep. Biaggi).
>
> ...[M]inority contractors and businessmen who are trying to enter in on the bidding process...get the "works" almost every time. The bidding process is one whose intricacies defy the imaginations of most of us here. The sad fact of the matter is that minority enterprises usually lose out... Id. (remarks of Rep. Conyers).

In the end, the House, by passing the MBE amendment, attempted to change this past history of minority exclusion from public works contracts, by assuring nothing more than an "equitable relationship for minority contractors and suppliers to be able to participate, which...is right and is proper." Id. at H1437 (remarks of Rep. Roe).

Like the House debate, the Senate debate stressed the historical fact that other federal efforts had failed to overcome gross inequalities in the letting of government contracts. In

debate, Senator Brooke also emphasized the special anti-recessionary impact of the MBE provision in reducing chronic minority unemployment:

> [I]t is important that we focus on the unemployment experiences of different ethnic and racial groups in designing a sensitive and responsive jobs program. For example, among minority citizens, the average rate of unemployment runs double that among white citizens.
>
> Our most recent experience with...[administering the 1976 PWEA] was marred by projects which were inappropriate in light of the strong congressional intent that the public works funds be spent where they are most needed.
>
> . . .
>
> ...It is necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors....
>
> ...[T]he Federal Government, for the last 10 years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the set-aside concept as a legitimate tool to insure participation by hitherto excluded or unrepresented groups.
>
> It is an appropriate concept, because minority businesses' work forces are principally drawn from residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens.
>
> ...This amendment provides a rule-of-thumb which requires much more than the vague "good-faith efforts" language which currently hampers our efforts to insure minority participation. Id. at S3910.

Thus, contrary to petitioners' suggestion that the 1977 MBE provision was an unreasoned effort to spread the "action" of federal contracts, the congressmen who spoke in favor of the provision articulated the historical exclusion of minorities from government contract work, and the inadequacy of alternative efforts to establish minority businesses as viable participants in the governmental contract process.

B. It Is Appropriate To Look To Prior Legislative Inquiries And Acts Of Congress, And To Consider All The Evidence Available To Congress, In Reviewing The 1977 MBE Provision.

Although petitioners attempt to narrow this Court's attention to the specific floor debates on the 1977 MBE provision, these debates need not and

should not be the limit of inquiry, for the "constitutional propriety...[of a statute] must be judged with reference to the historical experience which it reflects." South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The ready acceptance of the MBE provision by both houses of Congress[3/] demonstrates that Representative Mitchell's proposal did not arise in a factual vacuum; it was, in fact, considered "right and proper" in view of two decades of legislative and executive experience which had preceeded it.[4/] Congress need not

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3/ Debate focused almost exclusively on the feasibility of the ten percent figure in areas with few minority individuals, with most legislators otherwise accepting the appropriateness and fairness of the 1977 MBE provision. See 123 Cong. Rec. H1436-40 (daily ed. Feb. 24, 1977); 123 Cong. Rec. S3910 (daily ed. March 10, 1977).

4/ Petitioners, for example, claim that Representative Mitchell's remarks "concerning the rate of underutilization of MBE's were merely naked assertions on his part." Brief for Petitioners at 16. Mitchell stated that minorities received one percent of government contracts in an average fiscal year. 123 Cong. Rec. H1436-37 (daily ed. Feb. 24, 1977). Petitioners ignore the fact that the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business had before it in 1975 a report of the U.S. Commission on Civil Rights, Minorities and Woman as Government Contractors (May 1975), which found that in 1972 minorities and women received less than one percent of federal contracts. See p. 41 n.14 infra.

re-invent the wheel by restating evidence on the record whenever it passes yet another bill in an evolutionary legislative program.[5/] Indeed, the

> fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor. Cox, The Supreme Court, 1965 Term -- Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 105 (1966) (footnote omitted).

Congress, in short, must be able to rely on its accumulated knowledge and experience.

In addition to looking myopically only at the debates immediately preceding enactment of the 1977 MBE provision, and thereby conveniently avoiding the evidentiary weight of years of congressional

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5/ See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 654 & n.14, 646 n.5 (1966) (relying on hearings before prior Congress and on "understanding of the cultural milieu" existing in past); South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966) ("In identifying past evils, Congress obviously may avail itself of information from any probative source."); Oregon v. Mitchell, 400 U.S. 112, 235 & n.10 (1970) (Brennan, J.) (reliance on census data).

experience, see pp. 27 to 75 infra, petitioners assert that Congress did not make adequate formal "findings" of discrimination in the construction industry. Building Contractors' Brief at 11-15; Brief for Petitioners at 14-17. Petitioners make much of the fact that the MBE provision arose as a floor amendment, and appear to suggest that legislative action such as the MBE provision should be found defective unless it is supported by an independent congressional "study", perhaps in the form of committee consideration, and unless it is specifically addressed by "findings" in House and Senate reports generated at the time of legislative action. See Brief for Petitioners at 16 n.7; Building Contractors' Brief at 11-12.

Of course, congressional committees had previously made findings relevant to the 1977 MBE provision. See, e.g., pp. 37 to 69 infra. Moreover, it is unsound to demand that Congress proceed in so formalized a fashion. Petitioners' argument fails to recognize the signi-

ficance of the fact that this case involves action by Congress, and therefore fails to consider any distinction between Congress and other bodies with respect to the need for formal "findings" as a prerequisite to decision-making. See C. Black, Structure and Relationship in Constitutional Law 67-98 (1969).6/

This Court has explicitly stated that Congress is not required to make formal "findings" in order to justify the constitutionality of legislation. Katzenbach v. McLung, 379 U.S. 294, 299 (1964). See also Oregon v. Mitchell, 400 U.S. 112, 147 (1970) (Douglas, J.). In conformity with the presumption of constitutionality given Congress' actions, this Court has recognized that legislation should be found constitutional if there is a basis on which Congress could

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6/ Congress, of course, is not required by custom, statute or rule to make findings before it can act, unlike administrative agencies. See 5 U.S.C. §§ 553(c); 557(c)(3)(A) (1976); Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 94 (1943). See generally K. Davis, Administrative Law Treatise, §§16.01 et seq. (1958 and 1970 Supp.)

rationally have acted. See Cox, supra, 80 Harv. L. Rev. at 104-05 & cases cited in nn. 82-83.

Petitioners' argument could have disastrous practical ramifications for Congress. Legislation is frequently accomplished through floor amendments, see B. Gross, The Legislative Struggle 218 (1953), where "findings" are not and need not be made. See Katzenbach v. Morgan, 384 U.S. 641, 653, 654 (1966) (reviewing amendment introduced on floor of Congress without committee hearings or reports); Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971). To impose the formal requirement that "findings" be made by the Congress would be unreasonable:

> ...[D]ifferences from accustomed legal patterns merely reflect faithfully the different logic and discipline of the legislative process, within which the legislative counselor or representative must work.
>
> ...[T]he business of a legislator is not to adjudicate, but to legislate.... [H]is policy choices, whether statesmanlike or deplorable, are not limited to any pleadings or points raised in argument. If it were otherwise, the legislative process in our particular form of representative government would choke in a hopeless tangle of formal procedures within a few weeks. During the Eighty-fourth Congress 19,039 bills and resolutions were introduced in the two houses, 5,753 were reported out by the committees, and 1,028 public bills were enacted into law.
>
> Linde, Book Review, 66 Yale L.J. 973, 975 (1957) (footnote omitted).

See also J. Chamberlain, Legislative Processes, National and State 7 (1936).

In addition to these practical considerations, "findings" are not the source of Congress' legitimacy. Unlike a university faculty, or the commissioners of an administrative agency, the members of Congress are directly answerable to their constituents, a majority of whom are white, when they establish a remedial program such as the 1977 MBE provision. The political accountability inherent in our representative form of government, and not formalized procedures and fact-finding, is the mainspring of Congress' legitimacy and an effective check on its authority in a case where

racial minorities are favored. Cf. The Federalist Nos. 52, 57; H. Linde & G. Bunn, Legislative and Administrative Processes 736 (1976). This political accountability also permits greater judicial deference to Congress. "[A]s the most broadly representative, politically responsible institution of government," Congress is most likely to reach "a focused judgment about the appropriate balance to be struck between competing values." Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 701 (1975) (footnote omitted).

Knowing that Congress does not act in isolation from its past experience, the congressional proponents of the 1977 MBE provision explicitly recognized its relationship to several ongoing federal legislative programs with which Congress was familiar, and against which the provision must be judged. These include: (1) The Small Business Act, adopted in 1953 and repeatedly amended, in response to additional evidence, with increasing

focus on minority business enterprises; (2) legislation designed to use the federal government's spending power to remedy discrimination and to prevent the federal government from being implicated in discrimination practiced by recipients of federal aid; and (3) the anti-recessionary Public Works Employment Act of 1976, and its 1977 amendments, which required the swift spreading of money throughout the country to those most likely to spend, so as to maximize the anti-recessionary effect of each federal dollar. It is to these legislative programs that analysis of the 1977 MBE provision must turn.

1. In amending and enforcing the Small Business Act, Congress and the Executive have made studies of minority businesses, the discrimination they have suffered, and the effectiveness of various remedial strategies.

Both Congressman Mitchell and Senator Brooke recognized that the 1977 MBE provision at issue in this case was the next step in an evolving series of Small Business Administration (hereinafter "SBA") programs designed to aid minority

businesses. This recognition reflects the fact that Congress had focused on the problems of minority business enterprises on numerous occasions during its oversight of the Small Business Act.[7/] Congress' overall knowledge of, and concern with, the problems of minority-owned businesses is fully understood best by reference to that Act.

Congress and the Executive have repeatedly found a history of discrimination against minorities which has resulted in their exclusion from the mainstream of the American economy and, in particular, from government contracts, which represent a sizeable amount of contracting dollars. This exclusion has been found to result not only from the debilitating effects of discrimination which impair the inherent ability of MBE's to compete

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7/ Minority persons own few businesses, and the businesses they own are small. See, e.g., U.S. Commission on Civil Rights, Report, Minorities and Women as Government Contractors 11 (May 1975) (Respondent Kreps' Ex. No. 1, App. 124a); Bureau of Census, Special Report, Minority-Owned Businesses, 1972 Survey of Minority-Owned Business Enterprises, MB72-4, Table 1 at 16 (May 1975).

successfully, but also from the attitudes of government procurement officers who have resisted giving contracts to minority enterprises. In response to this discrimination, a variety of remedial programs have been tried, including contract set-aside provisions. The MBE provision involved in this case is an evolutionary step, necessitated in Congress' judgment by the failure of existing programs.

For at least 26 years Congress has sought to foster small businesses and assure them their fair share of government contracts, and specifically subcontracts for construction. In the Small Business Act of 1953, Pub. L. No. 163, title II, 67 Stat. 232, amended by Act of July 18, 1958, Pub. L. No. 85-536, 72 Stat. 384 (codified at 15 U.S.C. §§631 et seq.), Congress declared that the entry of individuals and small business enterprises into the market and the fair distribution of government contracts to them was essential to a strong economy, an efficient government procurement program, and fairness to the individual small

business person. Id. §2(a) (codified at 15 U.S.C. §631(a)).

In addition to providing for direct loans and technical advice, the Small Business Act from the beginning created a government contract set-aside program for small businesses. Id. §8(a) (codified at 15 U.S.C. §637(a)). This program, known as "the 8(a) program", was discussed by Senator Brooke during debate on the 1977 MBE provision. It originally authorized the SBA to enter into contracts with federal procurement officers for the acquisition of government supplies and equipment, and to subcontract, in turn, to small businesses for the performance of such contracts. From the start, also, the SBA was expressly charged with taking government-wide "action to encourage the letting of subcontracts by [private] prime contractors [on federal projects] to small-business concerns," not on strictly competitive terms,[8/] but "at prices and on conditions

8/ The Small Business Act, as amended, provides for a variety of non-racial special preferences to small businesses, and thus deviates repeatedly from the principle of strict market competition. See, e.g., 15 U.S.C.A. §§636(b), (i), (j)(3) (1979).

and terms which are fair and equitable." Id. §8(b)(5) (codified at 15 U.S.C. §637(b)(5)).[9/]

By 1967, Congress perceived the need to go one step further and to emphasize the needs of a specific portion of small businesses; it required the SBA to assure that federal funds would benefit low-income persons and the areas in which they lived. The Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, title II, 81 Stat. 710 (codified at 42 U.S.C. §§2901 et seq.), provided that the SBA should give "special attention to small business concerns (1) located in...areas with high proportions of unemployed or low-income individuals, or (2) owned by low-income individuals." Id. §406(a). It authorized the

9/ In 1961, another small business subcontracting program was added to the SBA to further assure that small businesses would be "considered fairly as subcontractors" for government contracts. Small Business Act Amendments of 1961, Pub. L. No. 87-305, §7, 75 Stat. 667 (codified at 15 U.S.C. §637(d)). This amendment provided that "the extensive use of subcontractors by a proposed contractor" would be a "favorable factor" in "evaluating bids or selecting contractors for negotiated contracts...."

SBA to assure "that contracts, [and] subcontracts...[made] in connection with programs aided with Federal funds are placed in such a way as to further the purposes of this title." Id. §407(a).

Following widespread urban unrest in 1967, President Johnson appointed the National Advisory Commission on Civil Disorders (the Kerner Commission) to investigate the civil disorders in black ghettos throughout the nation. Its report found discrimination rampant in American life. One of its "Recommendations for National Action" was "[e]ncouraging business ownership in the ghetto" by minority individuals. Report of The National Advisory Commission on Civil Disorders 236 (March 1, 1968). Despite the decade-old mandate of the SBA to encourage small business, the Commission found that the benefits of SBA programs had not adequately reached minority enterprises:

> We believe it is important to give special encouragement to Negro ownership of business in ghetto areas. The disadvantaged need help in obtaining managerial experience and in creating for themselves a stake in the economic community. The advantages of Negro entrepreneurship also include self-employment and jobs for others.
>
> Existing Small Business Administration equity and operating loan programs, under which almost 3,500 loans were made during fiscal year 1967, should be substantially expanded in amount, extended to higher risk ventures, and promoted widely through offices in the ghetto. Loans under Small Business Administration guarantees, which are now authorized, should be actively encouraged among local lending institutions. Id.

A response to the Kerner Commission's recommendation (and the discrimination which it described) required focusing long-standing SBA programs still more narrowly on minority business enterprises, the segment of small business most beset with difficulties.

Three presidential orders[10/] followed in the ensuing three years, premised on

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10/ Executive Order 11458, Prescribing Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise, 3 CFR, 1966-1970 Comp., p. 779 (March 1969) (ordering Secretary of Commerce to develop "comprehensive plans of Federal action" to promote the "growth of minority business enterprises"); Executive Order 11518, Providing for

(footnote continued)

(footnote continued)

the Increased Representation of the Interests of Small Business Concerns Before Departments and Agencies of the United States Government, 3 CFR, 1966-1970 Comp., p. 907 (March 1970) (ordering that the SBA "shall particularly consider the needs and interests of minority-owned small business concerns and of members of minority groups seeking entry into the business community"); Executive Order 11625, Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise, 3 CFR, 1971-1975 Comp., p. 616 (October 1971) (noting that "social and economic justice" required the "opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons," who include without limitation "Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts"; and requiring the Secretary of Commerce to coordinate "an increased minority enterprise effort," to develop "specific program goals for the minority enterprise program...[and] establish regular performance monitoring and reporting systems to assure that goals are being achieved.").

In response to the first Order, the Office of Minority Business Enterprise ("OMBE"), mentioned by Representative Mitchell during debate on the 1977 MBE provision, was established at the Department of Commerce. It funds organizations to "provide assistance to minority firms in obtaining procurements from...State and local governments, and the Federal Government.... A construction firm for example may be assisted in bidding and securing bonding for public or private sector contracts...." Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 8 (Sept. 1975).

the finding that "members of certain minority groups through no fault of their own have been denied the full opportunity" to "own their own businesses and thereby to participate in our free enterprise system". Executive Order 11518, 3 CFR, 1966-1970 Comp., p. 907. The Secretary of Commerce was required to establish a coordinated federal program with specific goals and monitoring systems and to encourage state, local and private programs to strengthen minority business enterprises.

As a result of the Kerner Commission Report and the three Executive Orders,[11/] a regulation was promulgated further narrowing the 8(a) program by specifically limiting eligibility for that program to

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11/ See S. Rep. No. 95-1070, 95th Cong., 2d Sess. 14, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3849 ("The 8(a) program simply evolved as a result of Executive orders issued by Presidents Johnson and Nixon in response to the 1967 Report of the Commission on Civil Disorders...[based on its] finding that...disadvantaged individuals did not play an integral role in America's free enterprise system, in that they enjoyed no appreciable ownership of small businesses....").

"disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." 35 Fed. Reg. 17833 (Nov. 20, 1970) (codified at 13 CFR §124.8-1). General government procurement regulations were also promulgated, requiring that "the maximum practicable opportunity to participate in the performance of government contracts be provided to minority business enterprises as subcontractors." 36 Fed. Reg. 17509 (Sept. 1, 1971) (codified at 41 CFR §1-1.1310-1).[12/] They required clauses in government procurement contracts committing private contractors to use their "best efforts" to maximize the participation of minority businesses as subcontractors.[13/]

12/ "For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos, and American-Aleuts." 36 Fed. Reg. 17509 (Sept. 1, 1971) (codified at 41 CFR §§1-1.1303, 1-1.1310-2).

Examination of MBE's by Congress and administrative agencies became exhaustive in 1975, only two years before the passage of the MBE provision

13/ In addition to these Executive actions, the Ninety-second Congress authorized the SBA to create minority enterprise small business investment companies (MESBIC's). Act of October 27, 1972, Pub. L. No. 92-595, §2(b), 86 Stat. 1314 (codified at 15 U.S.C. §681(d)). Their task was to contribute to a "well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages...." Id. An amendment, Act of October 24, 1978, Pub. L. No. 95-507, title I, §104, 92 Stat. 1758, increased the level of funding in order to reinvigorate these MESBIC's, so as to compensate for the "[h]istorically...acute shortage of equity capital and long-term debt" for small concerns owned and operated by socially and economically disadvantaged individuals. S. Rep. No. 95-1070, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3838.

The Ninety-third Congress recognized and confirmed the new emphasis in SBA policy by creating the position of Associate Administrator for Minority Small Business. Small Business Amendments of 1974, Pub. L. No. 93-386, §6, 88 Stat. 748 (codified at 15 U.S.C. §633).

at issue in this case. In that year, the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business held hearings to review the foregoing existing "efforts designed to assist the development of minority business." Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 1 (Sept. 1975) (summarized in Summary of Activities of the Committee on Small Business, H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 183 (Nov. 1976) (Respondent Kreps' Ex. No. 4, App. 123a)). Subcommittee Chairman Addabbo noted the need for

> effective remedial action...to guarantee opportunities for full economic participation to those members of our society who have traditionally encountered impediments or obstacles to entering the mainstream of business resulting from discrimination or similar circumstances. Id. (emphasis supplied).

In its report, the Subcommittee found that the dearth of minority-owned businesses was the result of racial discrimination and that the Government's

MBE programs had not cured the effects of such discrimination. It stated:

> The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees "equal protection of the laws." The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities.... Id. at I-2 (emphasis supplied).

The report reaffirmed the need for remedial programs to assure equal oppor-

tunity, and concluded that they would be proper if tempered by an equitable balance between those minorities injured by discrimination and those white persons innocent of discriminatory acts:

> In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.
>
> . . .
>
> It is, of course, hoped that some day remedial programs will be unnecessary and that all people will have the same economic opportunities. However, until that time remedial action must be considered as a necessary and proper accommodation for our Nation's socially or economically disadvantaged person....
>
> The subcommittee is mindful that remedial programs should not be used in such manner as to unjustly sacrifice the rights and privileges of the majority.... A balance must be struck and equity must be the keynote. Id.

In its report, the Subcommittee also related testimony about the inadequacy of the 8(a) program from various persons, including Representative Mitchell.

This testimony[14/] identified existing

14/ The Subcommittee also had as evidence, Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 11 (Sept. 1975), two government reports: a GAO report, Questionable Effectiveness of the 8(a) Procurement Program, GGD-75-57 (April 1975), and a U.S. Commission on Civil Rights Report, Minorities and Women as Government Contractors (May 1975). It was found that minority businesses are beset with, among other handicaps, unwarranted resistance from government contracting officers and that existing federal programs are failures; both of these considerations were expressed in the floor debate in support of the 1977 MBE provision.

On the basis of a wide-ranging survey of federal, state and local agencies and procurement officers and of minority business persons, id. at 142-175, the U.S. Commission on Civil Rights Report concluded that minority firms encounter "staggering" problems in bidding, in obtaining capital and in obtaining contracting information, id. at i. Moreover they are subjected to a great deal of unwarranted "skepticism" about their competency by government contracting officers. Id. Federal MBE programs have achieved only "limited success", and there is only "limited" compliance by state and local governments with federal efforts to increase minority subcontracting. Id. at ii. As a result, in 1972 minorities and women received only 0.7 percent of federal contracts, despite the fact that they represented 4 percent of all American business. Id. at 6, 111.

The U.S. Commission on Civil Rights also found that the MBE 8(a) program represents only 0.25 percent of all federal procurement spending, and that the program is only a limited success.

(footnote continued)

(footnote continued)

Id. at 41-42. In particular, the Report noted its slowness and lack of staff. Id. at 37-40, 46-47, 114. Finally, it found that the program suffers from the unsupported belief of some federal contracting officials, mostly white males, that MBE firms are less competent than others. Id. at 48-49, 112.

The Report found that the government-wide minority subcontracting program has had little impact; that federal contracting officers seldom monitor or enforce subcontracting requirements, id. at 78, 81-82, 84, 120-121; and that "from all indications,...[the subcontracting program] has failed to substantially increase either the number or dollar amounts of subcontracts...," id. at 79.

The Report made similar findings with respect to local and state government contracting programs. Because state and local governments spend more money on goods and services than the federal government, and spend more on smaller contracts for which small businesses are especially suitable, and spend significantly more of their dollars on construction contracts than the federal government, the Report found that "the volume and nature of State and local contracting is sufficent to provide extensive contracting opportunities to" minority and female firms. Id. at 87. Nonetheless in the Commission's survey, minority and female firms also were found to receive only 0.7 percent of state and local contracting dollars. Id. at 86, 122. Federal regulatory efforts do not appear to have resulted in a significant increase in local and state MBE programs. Id. at 89-93. The Commission's survey data reported only ten jurisdictions, of which New York was not one, which had established compliance programs under these regulations. Id. at 87. Federal and state enforcement or

(footnote continued)

resistance of public and private parties to minority contractors:

> [T]here is a great deal of resistance, particularly by the middle management level of Federal procuring agencies, to implement this [8(a)] program. Private industry is likewise hesitant to accept minority concerns...because of an established mode of business which has traditionally excluded minority-owned businesses. This is one reason...for the apparent inability of 8(a) firms to secure more commercial contracts. Id. at 11.

As a result of its study, the Subcommittee recommended an increase in the number of 8(a) contracts and the adoption of specific criteria defining which contracts were to be set aside for minority businesses. Id. at 34.

(footnote continued)

monitoring of "minority affirmative action subcontracting programs is virtually nonexistent." Id. at 91. In addition, the Report found that "[n]egative attitudes among State and local procurement officers also present a barrier to the participation of minorities . . . as contractors"; in general, these white male officials believe that such minority firms could not be relied upon to perform. Id. at 106-107. It noted that other contracting officials who were interviewed believed that a contract set-aside program was the most effective method for MBE aid. Id. at 107.

With respect to government-wide subcontracting regulations for minority businesses, the Subcommittee found that the "best efforts" regulations in 41 CFR Subpart 1-1.13 were "totally inadequate" because of "a glaring lack of specific objectives which each prime contractor should be required to achieve," a "lack of enforcement" and a lack of "meaningful monitoring." Id. at 32. The Subcommittee recommended that bidders on government contracts be required to include a "plan specifically designed to recruit minority subcontractors" and that sanctions be imposed for non-compliance. Id. at 36.15/

15/ The Subcommittee on SBA Oversight and Minority Enterprise considered other relevant matters during the two years immediately preceding passage of the 1977 MBE provision. It held hearings on the effect of New York City's fiscal crisis on small business, especially on MBE's. Effects of New York City's Fiscal Crisis on Small Business, H.R. Rep. No. 94-659, 94th Cong., 1st Sess. (Nov. 1975), summarized in Summary of Activities, A Report by the House Committee on Small Business, H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 150-63 (Jan. 3, 1977). The Subcommittee heard testimony that any change in the lending policies of New York banks would have a very detrimental impact on MBE's because economically and socially disadvantaged firms are especially affected by tight

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credit conditions. Id. at 162. Testimony also focused on the detrimental impact of the City's diminished spending for construction. Id. at 153. The Subcommittee heard repeated testimony that in case of a default, MBE's would be the worst hit of all, id. at 152-55, because "[t]raditionally, such businesses have been the first to be affected by the lack of credit, the shortened cash flow, and the lack of access to capital funding.... 'For these people, default could be a death knell.'" Id. at 152.

In addition, the Subcommittee, on March 25, 1976, requested the Comptroller General to conduct a study of the Department of Defense's Minority Business Enterprise Subcontracting Program. Comptroller General of the United States, Report, Department of Defense Program To Help Minority-run Businesses Get Subcontracts Not Working Well (Feb. 28, 1977) (Respondent Kreps' Ex. No. 3, App. 122a-123a). The Report found in general that the program was inadequate, id. at 5, 19-20; and specifically that the DOD lacked standards for the appropriate utilization of an MBE subcontracting clause, resulting in its wrongful omission from some contracts, that the subcontracting plans failed to establish specific contracting goals, and that the DOD did not monitor compliance, id. at 6-8. As a result the MBE subcontracting plans adopted by prime contractors were often inadequate. Id. at 12-14. Prime contractors usually relied on their previous suppliers or subcontractors and would not risk alienating these companies in order to use an MBE, id. at 16; as a result MBE's had a difficult time breaking-into established markets.

The next year, the Subcommittee provided detailed conclusions of discrimination against minority business, including a specific reference to construction.

> The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular. However, inroads are now being made and minority contractors are attempting to "break-into" a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them. Summary of Activities of the House Comm. on Small Business, 94th Cong., 2d Sess. 182-83 (Comm. Print Nov. 1976) (emphasis supplied.)

During this same period, a Senate committee was also holding hearings on the SBA's MBE program. Hearings on Small Business Administration 8(a) Contract Procurement Program Before the Senate Select Comm. on Small Business, 94th Cong., 2nd Sess. (Jan. 21, 1976). Senator Javits opened these hearings with the following remarks:

> This policy of promoting and advocating the integration of the disadvantaged into the U.S. free enterprise system and economic mainstream has been continuously restated in legislation enacted by the Congress and in Executive orders....
>
> In 1971, this committee recognized that businesses owned and controlled by disadvantaged persons receive less than one-twentieth of 1 percent of the total Federal procurement market. This committee is concerned that 4 years later, a 1975 survey by the Commission on Civil Rights indicates that firms owned by minorities and women still receive less than 1 percent of the total Government contracts.
>
> . . .
>
> Our focus is particularly timely today in view of the extremely detrimental effects of the current economic recession on the minority business community.... Id. at 1.

The Committee then heard testimony that minority enterprises have difficulty obtaining contracts in part because government procurement policies are so complex, id. at 169, and because private subcontracting is based as much on kinship and friendship as on low bids, id. at 57.[16/] In addition, one witness indicated that procurement officers in the 8(a) program deliberately let contracts involving non-technical and lower status jobs to minorities, and that this may arise out of resentment against MBE's. Id. at 151.

The Senate Committee's report, issued one week before Parren Mitchell introduced the MBE provision here at issue, also noted testimony that the long standing exclusion of MBE's from participation in the economy has its roots in slavery. Senate Select Committee on Small Business, 95th Cong., 1st Sess., Report on Small Business Administration 8(a) Contract Procurement Program 3 (Comm. Print Feb. 16, 1977). The

16/ Limiting the availability of subcontracts in this fashion can effectively discriminate against minorities. See p. 89 n.39 infra.

report also noted testimony recommending that Congress establish a set-aside program in all major pieces of spending legislation, so as to overcome the unresponsiveness and hostility to existing MBE programs of government officials and private contractors. Id. at 7-8.[17/]

Within weeks, Congress adopted the short-term MBE provision at issue in this litigation.

In its second session in 1978, the same Congress turned to the task of greatly strengthening the long-term MBE provisions of the Small Business Act. Act of October 24, 1978, Pub. L. No. 95-507, title II, 92 Stat. 1760. The accompanying Senate Report established that legislative and executive investigations had found that the SBA "had fallen far short of its goal to develop

17/ The appendix to the Senate Select Committee report included an investigative report, prepared for the Committee, concerning the New York and San Francisco offices of the SBA's 8(a) program. The investigation found that the offices were not serving "the management and technical assistance needs of 8(a) contractors," id. at 36, and were unable regularly and reliably to deliver contracts to 8(a) recipients, id. at 13, 37.

strong and growing disadvantaged small businesses," and that further changes were needed to rectify "the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." S. Rep. No. 95-1070, 95th Cong., 2d. Sess. 14, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3848-49.

Based on its knowledge of a decade of prior MBE programs, as confirmed by House and Senate hearings and administrative reports, Congress made several express findings of fact, including the finding that Black Americans, Hispanic Americans, Native Americans and other minorities have suffered from discriminatory practices with the result that such persons have been deprived of their right to full participation in the economy. Congress found:

> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

> (B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;
> (C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities;
> (D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
> (E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
> (F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and
> (G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements. 15 U.S.C.A. §631(e)(1) (1979) (emphasis supplied).

On the basis of these findings, Congress strengthened prior practice by giving the

SBA statutory authorization to arrange for the performance of 8(a) set-aside contracts through "negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work [et cetera].... " Id. §637(a)(1)(C).[18]

18/ "Socially disadvantaged persons are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C.A. §637(a)(5) (1979). This includes the group of "Black Americans, Hispanic Americans, Native Americans, and other minorities." Id. §631(e)(1)(C). The House Conference Report noted that "in many, but not all, cases status as a minority can be directly and unequivocally correlated with social disadvantagement." H. Conf. Rep. No. 95-1714, 95th Cong., 2d Sess. 21, reprinted in [1978] U.S. Code Cong. & Ad. News 3879, 3882.

"Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C.A. §637(a)(6) (1979). With regard to economic disadvantage, the House Conference Report mandated that regulations "recognize the historic past discrimination of minorities in their efforts to participate in the free enterprise system." H. Conf. Rep. No.

(footnote continued)

Although it did not require a particular percentage of set-aside contracts, Congress authorized the SBA to appeal a procurement officer's refusal to set aside a contract for SBA subcontracting.[19] Id. §637(a)(1)(A).

(footnote continued)

95-1714, supra, at 22, reprinted in [1978] U.S. Code Cong. & Ad. News at 3883. The Report in summary stated that the "Conferees intend that the primary beneficiaries of this program will be minorities," but that economic disadvantage is imposed (with regard to the 8(a) set-aside requirements) as a further limitation in order to focus on the 8(a) goal of furthering economic and business development only of those MBE's which require aid. Id.

A socially and economically disadvantaged small business concern is defined as one which is 51 percent owned by socially and economically disadvantaged individuals and the management and daily business operations of which are controlled by at least one such individual. 15 U.S.C.A. §637(a)(4) (1979).

19/ The Senate Report noted that the 8(a) program should use "Federal contracts as a means for the development of minority businesses in the more sophisticated kinds of industries such as...construction," rather than for janitorial services which now predominate. S. Rep. No. 95-1070, 95th Cong., 2d Sess. 11, reprinted in [1978] U.S. Code Cong. & Ad. News 3835, 3845.

With respect to general government-wide subcontracting, the accompanying committee report found that the SBA has "generally ignored" the authority it has to encourage private sector subcontracting to minority businesses, although "this authority is potentially among the most important in the Small Business Act for developing strong disadvantaged firms." S. Rep. No. 95-1070, supra, at 13, reprinted in [1978] U.S. Code Cong. & Ad. News at 3847. In response to this failure of the SBA, Congress established that

> It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency. 15 U.S.C.A. §637(d)(1) (1979).

It therefore required that in large procurement contracts each contractor adopt a strictly enforced MBE subcontracting plan, establishing "percentage goals for the utilization as subcontractors of...small business concerns owned and controlled by socially and economically

disadvantaged individuals,"[20/] id. §637(d)(6)(A), whom the contractor "shall presume... include Black Americans, Hispanic Americans,

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20/ In large negotiated procurement contracts, Congress required that an apparently successful offeror would have to negotiate "a subcontracting plan", 15 U.S.C.A. §§637(d)(4)(A), (B)(1979), providing for the use of small businesses and small businesses owned by socially and economically disadvantaged persons. Each such plan would be required to include "percentage goals for the utilization as subcontractors" of such businesses. Id. §637(d)(6)(A). The SBA was authorized to consider, in granting or denying a contract, the offeror's "prior compliance" with subcontracting plans, id. §637(d)(4)(C), and the likelihood that the current plan would result in "the maximum practicable" use of such small businesses, id. §637(d)(4)(D). Breach of the plan would constitute a material breach of the contract. Id. §637(d)(8). Congress required similar provisions in contracts let by formal competitive bidding. Id. §637(d)(5).

In addition, Congress required that all federal agencies, in consultation with the SBA, "establish goals for the participation...by small business concerns owned and controlled by socially and economically disadvantaged individuals..." in the agency's procurement contracts worth over $10,000. Id. §644(g). To further these goals, an Office of Small and Disadvantaged Business Utilization was established in each agency with procurement powers. Id. §644(k).

Native Americans, and other minorities," id. §637(d)(3)(C).[21/]

2. In enforcing fifth and fourteenth amendment prohibitions, Congress has found widespread discrimination in the distribution of federal funds by state and local governments and widespread discrimination by construction industry recipients of federal funds, and it has reviewed and accepted the use of race-sensitive goals as a remedy for that discrimination.

(a) Discrimination in state and local use of federal revenue-sharing funds.

During Congress' debates on the 1977 MBE provision, its proponents could draw not only on Congress' experience with the Small Business Act, but also on Congress' exposure to evidence of state and local discrimination obtained in its oversight of general revenue-sharing. In its review of this program, Congress considered ample evidence of discrimination prevalent among state and local governments

21/ With respect to the general subcontracting program, socially and economically disadvantaged individuals could also include "any other individual found to be disadvantaged by the [SBA] pursuant to section 8(a) of the Small Business Act." Id. §637(d)(3)(C).

in disbursing benefits, including federal funds.

Congress recognized the constitutional problem inherent in discrimination by state and local recipients of federal funds when it adopted Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d et seq. (1976). Based upon evidence of widespread discrimination, Title VI was enacted, in the words of one congressman, to "enable the Federal Government itself to live up to the mandate of the Constitution and to require States and local government entities to live up to the Constitution...." Quoted in University of California Regents v. Bakke, 438 U.S. at 331-32 (Brennan, J.). See generally id. at 284-87 (Powell, J.); id. at 328-340 (Brennan, J.).

The problems which Title VI addresses were exacerbated in 1972 by the passage of general revenue-sharing. 31 U.S.C. §§1221 et seq. (1976). Despite its general policy that revenue-sharing monies were to be disbursed "without strings", Congress deemed it necessary to adopt a provision to assure the equal protection of the laws by barring the

discriminatory use of these funds and establishing enforcement procedures beyond those of Title VI.[22/] Id. §1242.

The evidence of governmental discrimination which Congress had from its study of the SBA programs, see, e.g., pp. 15, 41-43 n.14, p. 48 supra, received additional support from a 1975 congressional hearing. That hearing provided clear evidence of continuing local and state discriminatory practices in the use of revenue-sharing funds. Hearings on Civil Rights Aspects of General Revenue Sharing Before the Subcomm. on Civil and Constitutional Rights of the House Comm.

22/ Also during this period, Congress found state and local governments guilty of widespread intentional discriminatory employment practices, as well as ostensibly neutral institutional practices having a discriminatory impact. Finding these practices even more widespread than in the private sector, Congress concluded that it was necessary to strip state and local governments of their prior exemption from Title VII coverage. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17-19 (1971), and S. Rep. No. 92-415, 92d Cong., 1st Sess. 9-11 (1971), reprinted in 2 Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 at 77-79, 418-20 (Comm. Print 1972). It is proper to presume that discriminatory attitudes which find expression in employment decisions could also find expression in other areas, such as the letting of contracts. Cf. Keyes v. School District No. 1, 413 U.S. 189 (1973).

on the Judiciary, 94th Cong., 1st Sess., ser. 21 (1975). The Chairman of the U.S. Commission on Civil Rights, Arthur S. Flemming, testified, for example, that the Commission had found "[a]bundant evidence...that discrimination in the employment practices and in the delivery of benefits of State and local government programs is far-reaching, often extending to activities funded by general revenue sharing."[23/] Id. at 154. Before the Subcommittee, also, was a report of the U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. IV, To Provide Fiscal Assistance (Feb. 1975), which described the enforcement efforts of the Office of Revenue Sharing as highly inadequate, see, e.g., id. at 63-64, in the face of this prevailing discrimination, see, e.g., id. at 31-34,

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23/ Flemming also noted that other studies, including one by the Comptroller General, confirmed this finding. Hearings on Civil Rights Aspects of General Revenue Sharing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 21, at pp. 155-56 (1975). See also id. at 109-10 (exchange between Undersecretary of the Treasury and Representative Drinan).

64 n.162.[24/] Testimony before the Subcommittee supported this judgment.[25/]

24/ Another report, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. VI, To Extend Federal Financial Assistance (Nov. 1975), reviewed Title VI enforcement efforts of several federal agencies and concluded that "Federal Title VI responsibilities have not been effectively discharged," id. at 756, because government-wide leadership is lacking, federal agencies engage in too little monitoring, and findings of violations rarely lead to enforcement proceedings, id. at 756-58. For example: the Federal Highway Administration has apparently never "required a State to set goals and timetables for increasing the number of minority or female contractors although in several cases the number of minority contractors used by States appeared inadequate," id. at 512-13; the Department of Transportation's adoption of a percentage goal for minority contractors apparently focused primarily on federal agency contracts and not on contracts awarded by state recipients of federal funds, id. at 514; and the wastewater treatment plant construction program of the Environmental Protection Agency was often of little benefit to minority contractors because the EPA's civil rights staff usually learned of contracts only after they had been awarded, id. at 621 n.1647.

25/ With five full time enforcement officers to police 39,000 recipient jurisdictions, the Office of Revenue Sharing could resolve few complaints. Hearings on Civil Rights Aspects of General Revenue Sharing, supra, at 97, 106-07, 125. Testimony showed the Office's inability to monitor and its hesitation to assure compliance with the law when violations were suspected. Id. at 157-64.

Accordingly, the Subcommittee's report expressly found discrimination in state and local governments' use of revenue-sharing funds coupled with inadequate federal enforcement efforts.[26/]

(b) Discrimination in the construction industry.

As a result of the Executive's efforts to prevent the discriminatory use of federal funds in federally assisted construction contracts, both the Executive and Congress had occasion to review evidence of the discriminatory practices of the construction industry and to sanction the use of affirmative goals as a remedy to that discrimination. The focus of executive efforts has been regulations promulgated pursuant to

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26/ See Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 5-8 (Comm. Print Nov. 1975) (finding widespread discrimination in local and state government activities, including in distribution of benefits and in employment); id. at 8-26 (finding federal efforts to monitor and enforce anti-discrimination provisions "grossly inadequate"); id. at 30 (suggesting that fifth and fourteenth amendments require more vigorous anti-discrimination enforcement than had previously existed).

Executive Order 11246, parts II, III, 3 CFR, 1964-1965 Comp., pp. 339, 340-47, which, in part, forbids the denial of equal employment opportunities in federal and federally assisted construction contracts. As a result of administrative findings of discriminatory employment practices, the regulations have established, as part of such government contracts, affirmative racial hiring plans. See, e.g., Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 163 (3d Cir.), cert. denied, 404 U.S. 854 (1971). Although superimposed on the prohibition of discrimination found in Title VII of the Civil Rights Act of 1964, these affirmative goals were deemed necessary by the Executive to assure non-discriminatory employment practices in the construction industry.

Congress has extensively and vigorously reviewed these affirmative goals and its repeated rejection of bills forbidding such goals, in 1969, and in 1971 and 1972, as well as in 1978, has constituted

ratification of them.[27]

Congress' awareness of this evidence of discrimination[28] has special signifi-

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27/ The history of this congressional debate and action has been repeatedly set before this Court and need not be recited once again. See University of California Regents v. Bakke, 438 U.S. at 341-47 (Brennan, J.); Supplemental Brief for the United States as Amicus Curiae 19-23, University of California Regents v. Bakke, supra; Brief for the American Civil Liberties Union and the Society of American Law Teachers Board of Governors, Amici Curiae 74-95, United Steelworkers v. Weber, 99 S.Ct. 2721 (1979); Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 7-15, United Steelworkers v. Weber, supra; Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723 (1972). See also Hearings on the Philadelphia Plan and S931 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 91st Cong., 1st Sess. (1969).

28/ The existence of widespread discriminatory practices among the construction trade unions are well known; indeed they are so notorious that they may be the subject of judicial notice. United Steelworkers v. Weber, 99 S.Ct. at 2725 n.1; see id. at 2735 (Burger, C.J. dissenting). Cf. Fullilove v. Kreps, 443 F.Supp 253, 260 n.17 (S.D.N.Y. 1977) (citing New York cases on discrimination in the building trades). If this discrimination is a subject of which the judiciary may take notice, it is certainly a subject of which the Congress may take notice.

cance to the 1977 MBE provision. The open and notorious discrimination in the building trades has a direct impact on the number and the capacity and skill of minority contractors. It is established that the route to becoming a contractor is usually through the building trades where important experience is acquired. For example, the ability to bid rationally and correctly and to manage the performance of a contract effectively can be hampered by exclusion from actual performance of similar work as a tradesman. Thus, even past job discrimination continues to undermine the capacity of minority enterprises to compete successfully for construction contracts.[29/]

29/ See Department of Housing and Urban Development, A Survey of Minority Construction Contractors 29 ("with virtually no exceptions, the route to entrepreneurship as a general or specialty contractor begins with entry into a skilled occupation. Examples of persons who become contractors without ever having worked in a skilled construction trade are extremely rare."); Rhode Island Chapter, Associated General Contractors v. Kreps, 450 F.Supp. 338, 356 (D.R.I 1978). The well-documented difficulties which MBE's have because of a lack of skills may be traced directly to this discrimination in the building trades. Cf. Office of Minority Business Enterprise, Minority Business Opportunity Committee
(footnote continued)

c) Discrimination in letting railroad construction contracts.

A congressional committee has also directly reviewed the specific need for quotas to prevent the discriminatory use of federal funds in the letting of railroad construction contracts, a fact which Senator Brooke called to Congress' attention in the 1977 MBE provision debate, see p. 18 supra. Because the revitalization of the railroads with federal funds provided a particularly significant source of contracts, and because it wished to further "an established national policy...to encourage and assist in the development of minority business enterprise," the Ninety-fourth Congress legislated to assure that MBE's would have an equal opportunity to

(footnote continued)

Handbook I-2 (Aug. 1976) (minority entrepreneurs deprived of skills by their historic exclusion from the mainstream economy); Executive Office of the President and Office of Management and Budget, Interagency Report on the Federal Minority Business Development Programs 29 (March 1976) (lack of management skills is a leading cause of minority business failure).

compete for such railroad contracts. See S. Rep. No. 94-499, 94th Cong., 2d Sess. 44-45 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 14, 58-59. The Railroad Revitalization and Regulatory Reform Act of 1976 required a non-discrimination clause in certain federally funded railroad construction contracts, and a mandatory fund cut-off procedure for violations thereof, 45 U.S.C. §803 (1976), and also special affirmative assistance to minority businesses in the form of a Minority Resource Center, 49 U.S.C. §1657a (1976).

Pursuant to the non-discrimination provision, the Secretary of Transportation promulgated regulations, 42 Fed. Reg. 4286 (Jan. 24, 1977) (codified at 49 CFR Part 265), which require, as a condition for receiving contracts worth $50,000 or more, that contractors "[w]here appropriate because of prior underutilization of minority businesses, establish specific goals and timetables to utilize minority businesses...." 49 CFR §265.13(c)(3)(vi). The regulations provide that compliance will be evaluated partially

in terms of "[s]pecific efforts to...award contracts to" MBE's. Id. §265.19(a)(2).

In subsequent hearings on railroad revitalization, congressmen have repeatedly scrutinized the success of this MBE effort. In one hearing, Congressman Mitchell expressed his grave concern that Amtrak's record on MBE contracting was so dismal that providing information and technical assistance through the Minority Resource Center would be useless if Congress did not regulate, in some mandatory fashion, Amtrak's letting of construction contracts. Special Joint Session Hearings on Purchase and Revitalization of Northeast Corridor Properties (Amtrak) Before the Senate Comms. on Appropriations, Budget and Commerce, 94th Cong., 2d Sess. 2-6 (1976).30/

30/ Mitchell stated "how absolutely frustrating it is" for him as a black congressman to vote for billions of dollars in appropriations, "knowing that minority businesses will not even . get an infinitessimal share of the money that's spent." Special Joint Session Hearings, supra, at 2.

In further hearings on April 26, 1977, during which Amtrak's record on MBE subcontracting

(footnote continued)

Senator Bayh concurred in this concern. Id. at 11. In response, the Secretary of Transportation indicated that he had taken steps to assure that there would be ample MBE subcontracting, id. at 13, and the Chairman of the Board of Amtrak assured the Committees that a 10 percent small business and MBE set-aside on Amtrak construction contracts would protect MBE's, id. at 45-47.

Thus, before the passage of the 1977 MBE provision, Congress, in fulfilling its constitutional duty to assure that federal funds would be spent in a non-discriminatory way, had investigated and debated the widespread discrimination in the letting of public contracts

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(footnote continued)

was reviewed, Mitchell expressed further doubts about the effectiveness of the Minority Resource Center and noted that, as of October 30, 1976, Amtrak, Conrail and the U.S.R.A. had let only 0.6 percent of their contracts to MBE's. Hearings on H.R. 7557, Department of Transportation and Related Agencies Appropriations for Fiscal Year 1978, Part IV, Before the Subcomm. of the Senate Comm. on Appropriations, 95th Cong., 1st Sess. 1285 (1977). See also id. at 1282-95, 1956-65, 1971-77, 2006-09.

generally and in the construction industry specifically and the necessity of affirmative goals to prevent discrimination in publicly funded construction.

C. Congress Recognized That, Because Of Racial Discrimination In The Construction Industry, The 1977 MBE Provision Significantly Advanced The Racially Neutral Anti-recessionary Purposes Of The Public Works Employment Acts of 1976 and 1977.

The Public Works Employment Act of 1976 was designed to fight the "worst recession" since the Great Depression by increased spending for state and local public works projects and services. H.R. Rep. No. 94-1077, 94th Cong., 2d Sess. 1 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 1746. This anti-recessionary statute manifested two qualities traditionally thought to be essential to effective counter-cyclical spending: money was provided quickly to those with the least propensity to save it.

Because time is of the essence in an anti-recessionary spending program,[31] the Act was "carefully and expressly designed," id. at 3, [1976] U.S. Code Cong. & Ad. News at 1748, to provide that a grant application would be deemed approved if the Secretary failed to act on it within 60 days, 42 U.S.C. §6706 (1976), and that projects would be required to commence work within 90 days after approval, id. §6705(d).

Furthermore, because spreading funds to those most likely to use the money for consumption purposes, that is to poor persons,[32] is of the essence, the Act directed the Secretary of Commerce, in allocating funds among projects and geographic areas, to take into account the severity and duration of each area's unemployment and under-employment, the income level of the area, and the effect of a proposed project on employment. Id. §§6706, 6707(c), 6707(d).

When Congress amended this Act in 1977, it left untouched the earlier provisions requiring speedy dispersal of funds, but amended other provisions to assure that each federal dollar spent would have the maximum multiplier effect on the economy by directing funds to poor persons who are likely to spend.

31/ Time is of the essence, in part, because increased spending must be counter-cyclical: it must not continue once the economy is in an upswing, lest inflation be fueled. H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 2 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 151; id. at 23, [1977] U.S. Code Cong. & Ad. News at 168 (supplemental views of Mr. Myers).

32/ Poorer persons spend a significantly greater percentage of their income on consumption, as the following table shows. U.S. Department of Labor, Bureau of Labor Statistics, Report 455-4, Consumer Expenditure Survey Series, Interview Survey, Table I (1977) (n of families = 71,220).

Before Tax Income	$0-2,999	$4,000-$4,999	$6,000-$6,999
Total Current Consumption Expenditures	$3,039	$4,531	$5,725
	$8,000-$9,999	$12,000-$14,999	$20,000-$24,999
	$6,921	$8,890	$12,591

One of these,[33] as Senator Brooke recognized, was the 1977 MBE provision which directed public works funds to areas "where they are most needed", "because minority businesses' work forces are principally drawn from residents of communities with severe and chronic unemployment." 123 Cong. Rec. S3910 (daily ed. March 10, 1977). Without this provision, such poor persons could be excluded from the benefits of the public works program by the discriminatory practices of the building trades. See, e.g., pp. 61 to 64 supra. By contrast with white-owned construction companies, minority businesses are much

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33/ Three other amendments also heightened the multiplier effect of the federal funds. Two of these sought to prevent the multiplier effect from being dissipated by spending outside the United States. See 42 U.S.C. §§6705(e)(2), (f)(1)(A) (in public works contracts, forbidding the employ of illegal alien labor and minimizing use of foreign made materials). In addition, the Act required that construction projects be built in those neighborhoods of highest unemployment or lowest income, should a local government derive its unemployment statistics, for purposes of its project application, from those areas. Id. §6707(e).

more likely to hire minority employees.[34] In addition, because most minority construction firms have few if any regular employees, U.S. Bureau of the Census, Special Report, Minority-Owned Businesses, MB72-4, 1972 Survey of Minority-Owned Business Enterprises, Table I at 16 (1972), an increase in contracts to them would undoubtedly result in new hires, see Executive Office of the President and Office of Management and Budget, Interagency Report on the Federal Minority Business Development Programs 51 (March 1976) (SBA finding that 81.4 percent of sampled MBE's increased their employment after receiving an 8(a) contract).

The proponents of the MBE provision recognized explicitly that the minority unemployment rate was double that of white citizens, and as high as 35 percent.

34/ See, e.g., A. Andreasen, Inner City Business: A Case Study of Buffalo, New York 147 (1971) (black-owned firms in Buffalo N.Y. hire much higher percentage of black employees than did white-owned firms); R. Glover, Minority Enterprise in Construction 27-28 (1977) (small minority construction firms have a significantly higher percentage of minority employees than white firms).

123 Cong. Rec. S3910 (daily ed. March 10, 1977) (remarks of Senator Brooke); 123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi). In 1977, the median income of minority families was approximately 61 percent that of white families, and a significantly greater percentage of minority persons than white persons were below the poverty line. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1978, Tables 729, 756. There was thus good reason for Congress to believe that the MBE provision would utilize federal funds for a maximum anti-recessionary effect, since, as Senator Brooke noted, it directed those funds to minority persons, who are among the poorest members of society and who, but for the provision, would be excluded from those funds by discrimination.

In addition, the 1977 MBE provision served as equitable direct aid to those who suffered from the differential impact a recession has on minority groups. Just as Senator Brooke noted,

the recession had brought severe unemployment to minority persons; in fact, their unemployment rate was double that of others. 123 Cong. Rec. S3910 (daily ed. March 10, 1977). The MBE provision sought to diminish that differential in unemployment rates, a purpose which could otherwise be frustrated by the effects of discrimination in the building trades.

Moreover, the recession had a particularly destructive impact on minority businesses. See id. (remarks of Senator Brooke); p. 47 supra (remarks of Senator Javits); p. 44 n.15 supra (H.R. Rep. No. 94-659). Like minority employees who suffer the "last hired, first fired" syndrome, MBE's (in many cases only newly formed due to past discrimination) had suffered heavily during the recession, see 123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi). Through the MBE provision, contracts would be available to minority businesses, including those in which the SBA had already made investment, which might otherwise have failed.

III. ACTING ON THE BASIS OF THIS HISTORY, CONGRESS WAS CLOTHED WITH ABUNDANT CONSTITUTIONAL AUTHORITY, UNDER ITS SPENDING POWER, UNDER ITS THIRTEENTH AMENDMENT §2 POWER, AND UNDER ITS FOURTEENTH AMENDMENT §5 POWER, TO ENACT THE 1977 MBE PROVISION.

There are, then, a multitude of factors which provide the historical context of the 1977 MBE provision: the exclusion of minorities from government contracts, the opposition of government contracting officers to minority businesses, the recognized inadequacies of existing programs designed to aid minority businesses, the historic discrimination against minorities in the construction industry, and the particularly severe economic plight of minorities during recessionary periods. Of all the branches of government, Congress is charged with special authority and discretion to deal with such problems, under its spending power and under the enforcement clauses of the thirteenth and fourteenth amendments. With these sources of authority, Congress possesses broad discretion to eliminate racial discrimination. Its judgment is measured by the standard of the "Necessary and Proper" clause; the Court should overturn

Congress' judgment only if there is no reasonable basis on which it could be sustained.

The MBE provision did not restrict the conduct of private or public parties without concurrently providing benefits. Congress, rather, disbursed substantial federal funds in a new program, on the condition that a small portion of them be set aside for minorities, thereby implicating the spending power, U.S. Const. art. I, §8, cl. 1. Because it is Congress' duty to determine how the needs of the nation will be served Congress' discretion in the exercise of the spending power is broad:[35/]

> The discretion [in exercise of the spending power]...is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. Helvering v. Davis, 301 U.S. 619, 640 (1937).

Clearly the relief of unemployment, id. at 641; Charles C. Steward Machine Co. v.

35/ Its authority to set the terms of government contracts is, if anything, even broader. See Perkins v. Lukens Steel Co. 310 U.S. 113 (1940).

Davis, 301 U.S. 548, 586-87 (1937), and the remedying of economic disparities among groups, Califano v. Webster, 430 U.S. 313, 318 (1977) (per curiam), are legitimate objects of the spending power. Congress' choices in spending can be successfully challenged only if "'by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.'" Helvering v. Davis, 301 U.S. at 641. The question is whether Congress "had a basis for" its choice: "Whether wisdom or unwisdom resides in the scheme of benefits...it is not for us to say. The answer to such inquiries must come from Congress, not the courts." Id. at 644.

This is particularly true, in a case such as this one, where Congress could perceive the inequitable disbursement of federal monies in the past to be the result of discrimination by governmental contract officers and of discrimination in the construction industry.

> 'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.' Lau v. Nichols, 414 U.S. 563, 569 (1974) (quoting Senator Humphrey).

Congress, of all branches of the federal government, is uniquely charged with the authority to prevent the "entrenchment" of racial discrimination by the enforcement clauses of the thirteenth and fourteenth amendments. Its exercise of the spending power is informed and directed by its responsibility under those clauses:

> Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments. Oregon v. Mitchell, 400 U.S. at 129 (Black, J.).

In section 5 of the fourteenth amendment, Congress is granted "by a specific provision," "the same broad powers expressed in the Necessary and Proper Clause...." Katzenbach v. Morgan, 384 U.S. at 650. Section 5

> is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation

> is needed to secure the guarantees of the Fourteenth Amendment. Id. at 651.

See also Oregon v. Mitchell, 400 U.S. at 127-28, 131 n.12 (Black, J.); id. at 145, 150 (Douglas, J.); id. at 231, 240 (Brennan, J.); id. at 284, 296 (Stewart, J.). Wide congressional latitude in exercising the authority granted by section 5 of the fourteenth amendment is recognized, lest the Court "depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." Katzenbach v. Morgan, 384 U.S. at 648 (footnote omitted):

> It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. Id. at 653.

Here, Congress had before it evidence of discrimination by state and local governments in a variety of areas including the awarding of federal monies. See, e.g., pp. 56 to 61 supra. There is also evidence that discrimination was notorious in the construction industry, so that even if local government officials

did not originally contribute to the racially exclusionary nature of the industry, they would necessarily become implicated in such discrimination by awarding contracts for the construction of public works and public buildings in a manner which openly preserved and rewarded private discrimination. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-26 (1961); Gilmore v. City of Montgomery, 417 U.S. 556, 582 (1974) (White, J., concurring); United States v. Guest, 383 U.S. 745, 755-57 (1966); United States v. Price, 383 U.S. 787, 794, 798 (1966). Because both the discriminatory practices of local and state officials and the entanglement of government with the discriminatory practices of the construction industry directly implicated the fourteenth amendment, Congress appropriately acted to forestall an unconstitutional exclusion of minority businesses from access to these federal funds. Rhode Island Chapter, Associated General Contractors v. Kreps, 450 F. Supp. 338, 349-51 (D.R.I. 1978).

Even if the fourteenth amendment were not implicated in this case by the

involvement and entanglement of state and local governments in discriminatory action, Congress' judgment in enacting the MBE provision would be supported by the enforcement clause of the thirteenth amendment. Id. at 360-66. That clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968). That power to redress societal and historic group-based discrimination, even by private parties, continues in force to this day. See generally id.

Again, Congress' discretion is broad:

> "...Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper...."
>
> ...Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Id. at 440 (footnote omitted).

It cannot be deemed "irrational" to view the exclusion of minorities from participation in the construction industry and from government contracts as a badge and incident of slavery, any less than the refusal of white planters to hire freed slaves for pay after the Civil War. Id. at 427. It is clearly established that Congress can, under this amendment, enforce the right of minorities to enter into contracts, whether individual employment contracts in the building trades, or MBE subcontracts with white businesses, or MBE primary contracts with local governments. See id. at 439 (Congress "plainly" possesses "the power to eliminate all racial barriers to the acquisition of real and personal property"); Runyon v. McCrary, 427 U.S. 160, 170-72 (1976).

It is open to Congress under the enforcement clause not simply to prohibit discrimination, as it has in 42 U.S.C. §§1981, 1982 (1976), but also to employ affirmative aid where simple prohibitory statutes are inadequate, as it now does in the MBE set-aside provision,

and in other special affirmative programs, and as it did over 100 years ago in legislation aiding ex-slaves, including the Freedmen's Bureau Acts, see Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae 10-53, University of California Regents v. Bakke, supra. "If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." Jones v. Alfred H. Mayer, 392 U.S. at 443.[36/]

36/ The power of Congress to include groups of Native Americans in the 1977 MBE provision, at least with regard to construction in and around their traditional lands, also derives from its plenary power to regulate the dealings of the United States with Indian tribes, and, in particular, its power to "regulate Commerce...with the Indian Tribes," U.S. Const. art. I, §8, cl. 3. On this basis, this Court has unanimously affirmed analogous legislation establishing a benign classification which prefers Indians for employment in the Bureau of Indian Affairs. Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

IV. THE 1977 MBE PROVISION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Congress did not abuse its special authority and competence when it enacted the 1977 MBE provision.[37/] That provision was a reasonable response to

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37/ Petitioners' argument that the 1977 MBE provision violates Title VI of the Civil Rights Act of 1964 and should therefore be struck down is absolutely frivolous. Because repeals by implication are not favored, Morton v. Mancari, 417 U.S. 535, 549-51 (1974); Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 193 (1968); Posadas v. National City Bank, 296 U.S. 497, 503 (1936); Wood v. United States, 41 U.S.(16 Pet.) 342, 362-63 (1842); because the very idea of repeal of a later statute by an earlier statute borders on the ludicrous, see Araya v. McLelland, 525 F.2d 1194, 1196 (5th Cir. 1976); International Union of Electrical, Radio and Machine Workers v. N.L.R.B., 289 F.2d 757, 761 (D.C.Cir. 1960); and because the MBE provision is the more specific of the two statutes, regardless of the date of passage, Morton v. Mancari, 417 U.S. at 550-551; Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961), the MBE provision is not rendered inoperative by Title VI. As this Court has said, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. at 551.

existing conditions, including the exclusion of minorities from government contracts and the notorious discrimination in the construction industry.

The MBE provision at issue in this case is not subject to the criticism that it is an "amorphous" response to social problems. University of California Regents v. Bakke, 438 U.S. at 307 (Powell, J.). To the contrary, the provision was "far more focused than the remedying of the effects of 'societal discrimination....'" Id.[38/]

38/ It is the position of the Lawyers' Committee that societal discrimination would by itself provide a sound basis for the limited preference of the 1977 MBE provision. See, e.g., University of California Regents v. Bakke, 438 U.S. at 362-73 (Brennan, J.); id. at 387-98 (Marshall, J.); id. at 402 (Blackmun, J.). This question need not be resolved in this case, however, in view of the specific past discrimination in government funded construction work which is addressed by the 1977 MBE provision.

It is, of course, not necessary for Congress to find discrimination on a case-by-case basis on the part of each private individual and government affected by the 1977 MBE provision. In utilizing the constitutional authority vested in it by the thirteenth and fourteenth amendments and the spending power, Congress, as this Court

(footnote continued)

(footnote continued)

has recognized, does not and cannot function as would a trial court or administrative agency in an adjudicatory proceeding. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 302-05 (1964); South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966); Oregon v. Mitchell, 400 U.S. 112, 133-34 (1970) (Black, J.); id. at 146-47 (Douglas, J.); id. at 216-17 (Harlan, J.); id. at 232-34 (Brennan, J.); id. at 283-84 (Stewart, J.). United Jewish Organizations v. Carey, 430 U.S. 144, 156-57, 161 (1977).

While Congress need not respond to discrimination on a state-by-state basis, it in fact had evidence concerning MBE's in New York State when it enacted the 1977 MBE provision. See p. 44 n.15 supra (effect of New York City fiscal crisis on MBE's); p. 49 n.17 supra (inadequacies of New York City SBA 8(a) office); Hearings on Small Business Administration 8(a) Contract Procurement Program Before the Senate Select Comm. on Small Business, 94th Cong., 2d Sess. 141 (Jan. 21, 1976) (testimony that New York State and City MBE contracting program was lacking); Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Civil Rights Aspects of General Revenue Sharing 6 (Comm. Print Nov. 1975) (New York City guilty of discriminatory employment practices). Cf. U.S. Commission on Civil Rights, The Unfinished Business, Twenty Years Later...A report submitted to the U.S. Commission on Civil Rights by its Fifty-One State Advisory Committees 142 (Sept. 1977) (implementation of New York State MBE subcontracting program ineffective despite high number of minorities in state; furthermore, "New York City's contract compliance program has been left in shambles by the State courts").

The 1977 MBE provision was directed at a specific segment of society's activities where past discrimination was notorious. It dealt with the construction industry, where past discrimination has been rife. See pp. 61 to 64 supra; United Steelworkers v. Weber, 99 S.Ct. at 2725 n.1; id. at 2732 n.* (Blackmun, J., concurring); id. at 2735 (Burger, C.J., dissenting). Employment discrimination in the building trades has prevented and delayed the creation of minority construction businesses, since contractors have traditionally gained necessary familiarity with construction practices as tradesmen-employees. See p. 64 & n.29 supra. Such discriminatory inhibition of the formation of minority construction enterprises means that they are presently hampered by inexperience and small size, so that even a facially "neutral" system would operate to "perpetuate...past inequities." See p. 46 supra. These problems are exacerbated by the present unwillingness of white contractors to deal with minority

enterprises.[39/] See, e.g., p. 45 n.15, p. 48 supra. Letting contracts to such white contractors would also exacerbate and perpetuate the effects of discrimination on the employment of minorities as construction workers; white firms, even years after the passage of Title VII, are far less likely than MBE's to have minority employees. See, e.g., pp. 18-19, p. 63 n.28, p. 73 n.34 supra.

39/ The reasonableness of Congress' concerns is buttressed by petitioners' evidence in this case, which indicates the existence of an "old boy" network effectively excluding minority businesses from participation in construction work. One general contractor testified that he did not even solicit MBE's to bid on subcontracts: there were four non-minority firms which he "generally contact[ed] with respect to getting a price for performance of" certain work. App. 65a-66a. An affidavit submitted by an industry official in support of petitioners' request for injunctive relief claimed that irreparable injury occurred when petitioners were required to "enter into subcontracts with subcontractors ...other than those with whom a long standing relationship of trust and confidence has been established." App. 29a.

Such thinking reflects a system operating to exclude minority enterprises, where contractors deem it irreparable harm to deal with a new enterprise and where MBE's are not even requested to submit bids. See United States v. Georgia Power Co., 474 F.2d 906, 925-26 (5th Cir. 1973) (word-of-mouth hiring violates Title VII by isolating blacks from 'web of information' in the company).

The 1977 MBE provision, moreover, was not directed at the construction industry at large, but only at a specific and limited portion of that industry's activities: the performance of public works contracts. Congress had evidence of the effective exclusion of minorities from government contracting. There was evidence of discrimination by government contracting officers, including, in particular, discrimination by state and local contracting officers in the disbursement of federal funds. See pp. 41-43 n.14, pp. 43, 48, 49, 56-61 supra. All of this evidence, and more, was before Congress when it enacted the 1977 MBE provision.[40/]

Congress' response to the conditions it perceived was temperate and reasonable.

40/ Because of the substantial evidence that the 1977 MBE provision was necessitated by past and present discrimination in the construction industry and in the awarding of government contracts, it cannot be said that the provision "stigmatizes" minorities. It is a response to perceived discrimination in a narrowly circumscribed arena, and not a response to any presumption that minorities are "inferior" or incapable of succeeding in a nondiscriminatory environment. See University of California Regents v. Bakke, 438 U.S. at 357-58, 360, 375-76 (Brennan, J.).

The MBE provision applied only to the 1977 PWEA amendments, not to all government projects. It was therefore temporary and self-limiting, with the result that its impact on white contractors was transitory. See United Steelworkers v. Weber, 99 S.Ct. at 2730; id. at 2734 (Blackmun, J., concurring). Moreover, the short term nature of the 1977 set-aside meant that its effects on both whites and minorities could be evaluated before similar provisions were considered. See Oregon v. Mitchell, 400 U.S. at 216-17 (Harlan, J.). The MBE provision was, moreover, reasonable in that it was limited to a maximum of ten percent of 1977 PWEA funds, less than the percentage of minority citizens in our nation.[41/]

41/ See United Steelworkers v. Weber, 99 S.Ct. at 2732 n.* (Blackmun, J., concurring) (black population alone is 11.7 percent in 1970).

The 10 percent figure is, of course, greater than the percentage of construction enterprises owned by minorities. This fact does not undercut the reasonableness of the MBE provision, because the number of minority construction firms has been impaired by discrimination. See, e.g., pp. 39, 46, 64 & n.29 supra.

Cf. University of California Regents v. Bakke, 438 U.S. at 374 n.58 (Brennan, J.). Even this ten percent figure was not cast in stone; it could be waived when the low percentage of minority contractors in a trade area made the 10 percent figure infeasible. Indeed, the ten percent of 1977 PWEA funds in fact set aside amounted to only one quarter of one percent (.25 percent) of annual construction expenditures in the United States. Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978). Thus, the impact on white contractors was minimal in view of the goals of the provision.

The 1977 MBE provision did not "unnecessarily trammel the interests of" white contractors. United Steelworkers v. Weber, 99 S.Ct. at 2730. It did not mandate the displacement of white contractors from projects previously available to them, or otherwise frustrate their existing expectations. See id. Congress did not impose a new minority business requirement on existing federal programs; it merely set aside ten percent of entirely new federal funds which would otherwise not have been available.

After passage of the 1977 PWEA amendments, white contractors found themselves not with less than they previously had but rather with more, access to 3.6 billion new federal dollars. These benefits were perhaps not as great as they could have been, absent the 1977 MBE provision, but they were still substantial,[42/] cf. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Congress' allocation of funds was not unreasonable.

Petitioners' criticisms of the 1977 MBE provision are, in essence, policy arguments more properly directed

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42/ Moreover, since the 1977 MBE provision affected only one-quarter of one percent of this Nation's construction work, for only a single year, it did not prevent white contractors from pursuing their chosen professions. White contractors had complete access to 99.75 percent of the work available during the term of the MBE provision, and to all work thereafter. In contrast to exclusion from a program leading to a medical degree, see University of California Regents v. Bakke, supra, the MBE program had no residual effect on succeeding years for white contractors.

to Congress than to this Court.[43/] Petitioners argue that Congress erred in adopting the 1977 MBE provision because it was "non-effective", Building Contractors' Brief at 19, while they simultaneously urge other "less drastic" means, including tax incentives to encourage joint ventures between minority enterprises and established contractors; technical, financial and educational assistance programs; the provision of retired or other experienced construction industry executives to MBE's in the manner of Junior Achievement; assistance to MBE's in securing bonding, and so on, id. at 24-31. See also Brief for Petitioners at 26-27 (recommending that Commerce Department ensure that business in high unemployment areas become "aware of" federal projects, and assist such businesses in "familiarizing

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43/ The evidence on which the 1977 MBE provision was premised would enable it to survive "strict scrutiny", were the Court to analyze the provision in those terms. However, since this case involves an appropriate response to discrimination by Congress acting pursuant to its express mandate under the thirteenth and fourteenth amendments, the MBE provision need not be analyzed in such terms. See pp. 76 to 84 supra.

themselves" with general contractors who bid on federal projects).

Congress has in fact already adopted various of these proposals.[44/] But it had ample reason not to rely exclusively on these alternatives to reverse the historic exclusion of minorities from government contracts. Petitioners' recommendations, first of all, ignore

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44/ It was also rational to conclude that the stringent time limits necessarily imposed on 1977 PWEA expenditures made impossible the broader categorization of beneficiaries used in the 1978 Small Business Act amendments, which petitioners apparently approve. Brief for Petitioners at 27-28; Building Contractors' Brief at 29-30.

The 1978 Small Business Act amendments, as petitioners point out, favor "socially and economically disadvantaged individuals", and not exclusively minorities. While this broader category of beneficiaries may be politic for an ongoing program such as the Small Business Act, it would not have been reasonable for a short-term program operating under severe time constraints. This is apparent from the SBA procedure now necessary to determine which individuals other than minorities are "socially and economically disadvantaged", 44 Fed. Reg. 30673 (May 29, 1979)(to be codified in 13 CFR Part 124), a procedure clearly impracticable in the context of the 1977 PWEA program.

the fundamental fact that rapid disbursement of federal monies was integral to the 1977 PWEA amendments. See pp. 69 to 71 supra. Congress could have readily found that none of the recommended alternatives, such as tax incentives and assistance programs, would have had any effect at all within the stringent time limits required by the Act.

Moreover, even were the 1977 MBE provision not compelled by temporal constraints, Congress could still have readily determined that it was necessary. Petitioners' recomendations are strikingly similar to the SBA programs which had been tried in the past and which had been ineffective in curing the effects of discrimination against MBE's seeking access to government contracts. The SBA and OMBE had long been charged with the obligation of providing MBE assistance, MESBIC's had been charged with the responsibility of encouraging investment in minority enterprises, private contractors had been required to use "good faith" efforts to subcontract to MBE's, and "goals" for MBE utilization had been

mandated. Yet, as was made clear during the debates on the 1977 MBE provision, see, e.g., pp. 13 to 15, 18 to 19 supra, and was amply supported by Congress' experience, see, e.g., pp. 41-43 n.14, p. 45 n.15, p. 48, p. 49 n.17, p. 53 n.19 supra, the net effect of all these programs on minority access to government contracts had been minimal. While each of petitioners' suggestions may be helpful, and while each may address a portion of the problems faced by MBE's, Congress had ample reason to conclude that none of them would have effectively remedied the effects of past discrimination against MBE's in the construction industry or the unwarranted reluctance of government contracting officers and established white contractors to deal with minority enterprises. See 123 Cong. Rec. H1436-37, 1438 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). It is reasonable to conclude that petitioners' recommendations could be called "less drastic" than the 1977 MBE provision for only two reasons: they would be not

only too slow but also ultimately ineffective.45/

45/ It is the position of the Lawyers' Committee that Congress could proceed on an industry-wide basis, that the facts before Congress amply justified its nationwide approach, and that these same facts are appropriate for judicial notice. But if, on the facts of the record, this Court were to entertain doubts about the constitutionality of the 1977 MBE provision, as it has affected the particular Petitioners before this Court, then it should remand this case to the district court with instructions to allow Respondent Secretary of Commerce an opportunity for a full trial on the merits.

For if, despite the presumption of constitutionality, Respondent is required to place on the record facts supporting the 1977 MBE provision, extant when Congress adopted it, then that opportunity was denied Respondent when the district judge consolidated the hearing on a preliminary injunction with a trial on the merits, and held both on December 2, 1977, two days after the complaint was filed. See App. 47A-49A.

A remand would permit Respondent Secretary of Commerce to put on the record the abundant evidence, some of which has been cited in this Brief, which was before Congress. Then Petitioners would be unable to make a claim that Respondent had failed to give them "a demonstration that the challenged classification is necessary to promote a substantial state interest." University of California Regents v. Bakke, 438 U.S. at 320 (Powell, J.).

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1007

H. EARL FULLILOVE, ET AL.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF AMICUS CURIAE FOR ALPHA KAPPA ALPHA SORORITY, INC.

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BRIEF AMICUS CURIAE FOR ALPHA KAPPA ALPHA SORORITY, INC.

Alpha Kappa Alpha Sorority, Inc., with the consent of all parties, respectfully submits this Brief as Amicus Curiae.

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED.

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U. S. C. Section 6705(f)(2) provides that notwithstanding any other provision of law, and

> "(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

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San Antonio Independent School v. *Rodriguez,* 411 U. S. 1, 36 L. Ed. 16, 93 S. Ct. 1278 (1973).

Shapiro v. *Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

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Constitution, Statute and Regulations.

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INTEREST OF THE AMICUS CURIAE.

The Alpha Kappa Alpha Sorority is a national Sorority organized in 1908 in Washington, D. C. for the black women students of Howard University. In its 71 year history it has grown to a national membership today in excess of 25,000 and it has 302 affiliated college chapters and 305 graduate and alumni chapters.

Its constitution provides that its purposes include an obligation ". . . to improve the social stature . . . and to be of service to all mankind". The programs of the Sorority have involved it in the implementation of such objectives. It has established a Foundation for its charitable and educational objectives, and it has been a major financial contributor to civil rights organizations over the years.

In 1965 it became the contractor for a major Job Corp Project in Cleveland, Ohio which is presently funded by an Annual Budget of 3.2 million dollars and which project has served in excess of 12,000 Job Corp trainees.

The Sorority's concern with opening up opportunities for employment for blacks and minorities is deep and abiding; its interest in the economic opportunities available to black and minority enterprises arises from this concern and from its basic dedication to our social stature and to the eradication of impediments thereto.

STATEMENT OF THE CASE.

This case was begun as an action by certain nonminority construction contractors to prevent the Secretary of Commerce from enforcing the requirements of the 1977 Public Works Employment Act that 10% of the amount of each grant by the Secretary under that Act "shall be expended for minority business enterprises". The United States District Court declined to enjoin the enforcement of that requirement of the Act, and stated for the reasons set forth in its decision, that the challenged provisions of the Act were in fact constitutional.

On appeal, the Court of Appeals, in a unanimous decision, affirmed the decision of the District Court, and, after reviewing at length the legislative history of the Act and after measuring the Act's purpose against the Constitutional standards of a compelling state interest and reasonable means, it also concluded that the challenged provisions of the Act were in fact constitutional.

The Contractors then petitioned this Court for a Writ of Certiorari, and this Court has granted that Writ.

The question before this Court is whether, under the circumstances of this case, Congress may provide a requirement that 10% of the grant funds authorized under the Public Works Act "shall be" expended for minority business enterprises as

defined in the Act, or whether such a requirement, because it creates a category that is "race sensitive" must be held to be violative of the requirements of the equal protection of the laws.

It is the position of this Amicus Curiae that the provisions of the challenged Act are indeed proper and are fully reflective of the historic interests of Congress and are fully consonant with the standards which this Court has determined are appropriate to measure the Constitutionality of enactments of Congress, and that the decision of the Court of Appeals should be affirmed in this case.

ARGUMENT.

I.

Introduction.

The minority business "set aside" program is a part of the 1977 Public Works Employment Act, as Section 103(f)(2) (42 U. S. C. 6705(f)(2)). It is also a part of the congeries of legislative enactments by the United States Congress which describe standards and set forth conditions designed to overcome established patterns of discrimination against blacks and other minorities, and to assure their participation in the political educational, employment and economic opportunities within the United States.[1]

It is clear that there has been a major political and social upheaval in our society. Its historic antecedents may be in the moral interdictions of the Constitution as originally enacted. Its growth and emergence, however, has taken strength from the seminal events of the mid 1800's and the equally seminal events of the mid 1900's.[2]

1. The Court of Appeals in this case identified some of the examples of such Congressional Responses in its footnote No. 7. *Fullilove* v. *Kreps*, 584 F. 2d 600 at 605.

2. The literature that has chronicled the changing interpretations of the 5th and 14th Amendments and the growing reaction

(Footnote continued on next page.)

However historians may choose to analyze the phenomenon, and without regard to the varying opinions as to its cause and its prime movants, the fact of the civil rights awakening can not be gainsaid and the reality of the Congressional and Judicial response to it has been pervasive and awesome.

It would be naive in the extreme to seek to understand any Congressional enactment outside of the context of such a history and of such a reality.[3]

The minority "set aside" program may have been couched in a public works employment context, but to suggest that it is not a cognative part of the recognition by Congress of and Congress' response to an awareness of past discriminations and a methodology for its elimination, would be to relegate reality to a one way mirror of myopia.

Having said all of this, we mean hereby to provide this Court not with the necessary rationale for the resolution of a particular case, but rather to provide the framework for understanding the atmosphere in which specific legislation emerged.

Having said all of this, we recognize that this document is a Brief that speaks to Judges on concrete issues, and that this document must therefore speak in the vocabulary that articulates the decisional process. This is conceded and the remaining sections of this Brief are therefore so addressed.

It is the conclusion of this Brief, however, that the historic context and milieu just provided is indeed the fabric which most accurately should enwrap the ultimate Court decision on this case.

(Footnote continued from preceding page.)
and responses of Congress and State legislatures thereto is extensive: *Simple Justice* by Kluger; *Race Discrimination in American Law*, by Stephenson; *Equality by Statute*, by Berger; *The Strange Career of Jim Crow*, by Woodward and *Down the Line*, by Rustin are but a few examples.

3. Justice Powell in *University of California Regents* v. *Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 has underscored the importance of understanding the "background of the problem that Congress was addressing . . ." p. 285.

II.

The Set Aside Program Is Consonant with the Standards This Court Has Posed to Judge Congressional Legislation.

The history of the United States Supreme Court, and indeed generally of all judicial interpretation in the common law mode, has been one in which the Court has assumed the basic responsibility of defining the broad interpretations of the Constitution. It is not now important here to chart the zigzag patterns by which Constitutional interpretation has emerged. And it is not now important to identify the Courts' involvement in recent years as the principal prodder in civil rights, due process, and equal protection matters. What is important for the purposes of this Brief is to recognize that this Court has come to grips with civil rights considerations and this Court has proffered standards by which to measure such words as "due process" and "equal protection of the laws" not only as to private actions and public actions, but also, in the context of this case, public actions as articulated by the legislation of the United States Congress.

Interestingly enough, it is also not necessary in this Brief, to analyze at any great length what the emergent judicial standard has become in testing Congressional enactments that involve carving out particular categories.

The relevant standards are articulated in both the opinion of District Court and in the Court of Appeals in this case, and their recital of the standards seem to have been accepted by the Petitioners in this case. Succinctly, the Court has said that where Congress has used a legislative criterion which is itself race sensitive, it is then the duty of the Court to peruse that criterion in terms of a "strict scrutiny" so as to determine that the objectives to which it is addressed represent a compelling governmental interest.[4] If the Court satisfies itself that this ingredient is present,

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4. *Loving* v. *Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Shapiro* v. *Thompson*, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

then an additional standard must be met, and that is, that the legislative mechanism itself is the least "intrusive" mechanisms to achieve those objectives.[5]

The reason why this case is now before this Court is not because the Petitioners disagree with the foregoing, but that they disagree with the interpretation of the standards as given by the District Judge and by the Court of Appeals Judges.

It becomes important therefore to evaluate the standards thus recognized by this Court against the detail that is the minority business enterprise set aside program of the 1977 Public Works Employment Act.

It is the argument of this Amicus Brief that the two pronged standard is clearly satisfied by a review of this program.

A. There Is a Compelling State Interest.

As we have suggested, Congress's concern with problems of past and present discrimination is a modern day reality that has emerged from the historic lessons of the civil rights struggles. And Courts have confirmed that such concern is appropriate and "compelling".[6]

Indeed, Petitioner's apparently also concede that such a purpose is "compelling".[7] Petitioner argues, however, that no such purpose was present as to the Public Works Employment Act. Such reasoning ignores the impact of the historic context delineated at the outset of this Brief. Such reasoning posits that each piece of legislation emerges in a pristine state unencumbered by the tone and atmosphere of its times. Such reasoning emasculates reality and builds straw men in a windstorm.

There is more. There are decisions of this Court that indicate that the discernment of legislative purpose must first be made

5. *Dunn* v. *Blumstein,* 405 U. S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

6. *Contractors Ass'n.* v. *Secretary of Labor,* 442 F. 2d 159 (1971).

7. Brief of Petitioner in this cause, pp 10-11.

by looking at the four corners of the statute itself.[8] The set aside program is included in legislation that provides massive dollars to beef up the construction industry and then says that 10% of each such grant "shall be expended for minority business enterprise". Congress made the legislative determination that the injection of federal funds into construction projects was in the national interest. Congress went on to say that it was appropriate that 10% of each grant must have a minority involvement. Measured against the climate of the times; measured against the various responses Congress has created to the historic fact of past discrimination it seems clear that the "purpose" of Congress related to this admitted "compelling" interest of government.

There is still more! The set aside arose as an Amendment made on the floor by Congressman Mitchell. He spoke to a "fair share" for minorities and to a pattern of "denial" of participation of minorities and to the setting of this mechanism to "get the minority enterprises into our system.[9] Congressman Biaggi talked about the record with respect to opportunities for minority business enterprises as "a sorry one".[10] When the issue came up in the Senate, the dialogue was very brief indeed, but what was said was unambiguous. Senator Brooks cited the statistics of minority business receiving only 1% of Federal Construction dollars.[11]

Both the District Court decision and the Court of Appeals decisions allude not only to the pronouncements of the legislation, but also to governmental documents and reports that were extant at the time of the dialogue.[12]

8. See the extensive discussion in Note, Development in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). See also *Katzenbach* v. *Morgan,* 384 U. S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966).

9. 123 Cong. Rec. H. pp 1436-1437.

10. 123 Cong. Rec. H. pp 1440.

11. 123 Cong. Rec. S. p 3910.

12. *Fullilove* v. *Kreps,* 443 F. Supp. 253, 258-9; *Fullilove* v. *Kreps,* 584 F. 2d 600, 606.

A Congressional "purpose" that recognized discrimination patterns against minorities in the past and then designs a program to cope therewith, therefore emerges not only from the four corners of the legislation, but also from the verbalization of Congressmen who spoke to the issue and from the background studies and reports that were available on the subject.

B. The Set Aside Program Is a Permissible Legislative Format to Accomplish the Admitted Compelling State Purpose.

The "purpose" identified in the preceding section relates itself to the elimination of past and present discrimination in the construction industry which has kept minorities outside the pale of Public Construction contracting. The set aside procedure is aimed specifically at remedying that evil: it is no longer a question of overcoming subtle techniques at exclusion, this legislation creates an affirmative duty for inclusion. The imprecision of previous government construction contracting practices is replaced by an unambiguous directive. Minorities who had been outside the pale are now required to be inside the pale. The Congressional mechanism is therefore, clearly aimed at its purpose and clearly will result in actual minority participation.

But it is suggested that other mechanisms could have been chosen and that their impact would have been less "intrusive". Programs for joint ventures, or job training, or revisions of bid procedures, or bonding guarantees are some of the alternatives that Petitioner has suggested.

That Congress could have chosen one or more of such mechanisms is obvious. Indeed, Congress has in fact opted for one or more of such responses in other contexts to rectify the malaise of past and present discrimination.[13] In a host of instances,

13. 20 USC 1071 *et seq* is the Higher Education Act, and it provides programs of financial assistance. 15 USC 637 is a part of Small Business Act and it provides programs relating to bid requirements.

various Courts have indeed upheld such mechanisms as proper and appropriate reactions of Congress.[14]

It does not follow, however, that any one or more of such techniques is exclusive, or that any one or more has in fact proven by experience to work and remedy such past and present discriminations. It is certainly clear that no one of such proffered alternatives necessarily will result in a significant participation by minorities. The statistics do not show this to be the case. Anyone familiar with an iota of the education and employment discrimination cases knows that such similar remedies have proven to be mere band-aids. The massive infection of discrimination goes forth unchecked—and significant numbers of minorities continue outside of the mainstream.

The Constitutional test is not that this Court should substitute its judgment for the Congressional judgment as to how best to meet a problem; it only requires that the means be not unduly burdensome on others. The decision of the Court of Appeals cites the statistics that conclusively show that the set aside burden is minimal:[15]

> ". . . (Since) minority-owned business amount to only 4.3 per cent of the total number of firms in the construction industry, the burden of being dispreferred in .25 per cent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 per cent of the industry . . ."

III.

The Bakke Decision Is Consistent with Upholding the Set Aside Program.

No analysis of what a Court should do in a given "due process" situation where the solution has itself involved a racial category, can be valid today without reference to this Court's

14. *San Antonio Independent School* v. *Rodriguez*, 411 U. S. 1, 36 L. Ed. 16, 93 S. Ct. 1278 (1973).

15. *Fullilove* v. *Kreps*, 584 F. 2d 600, 608.

recent articulation upon the subject: the 1978 *Bakke* decision.[16] The District Court in this case entered its decision before the *Bakke* decision by this Court, but the Court was fully aware that the decision was pending. The Court of Appeals decision in this case cited from the *Bakke* decision at several points. The Brief of Petitioner and the Brief Amicus Curiae of the Equal Employment Advisory Council filed in support of Petitioner, also cite at length from *Bakke*.

It is the thesis of this Brief that there is nothing in any of the exhaustive *Bakke* opinions that suggest or constrain a conclusion that the set aside program is or should be invalid.

The specific admissions program of the Medical School of the University of California in *Bakke* was deemed to have been unconstitutional, although the fact that race was a determinant of admissions was deemed not to violate the Constitutional tests. *Bakke* continues to tell us that racial classifications are suspect; that they require strict scrutiny; that they must serve a compelling state interest, but that they are not per se invalid, and, indeed are appropriate under particular circumstances.[17]

Bakke therefore, marches along in the parade of consistent pronouncements by this Court as a part of the pellucid historic thrust that was denoted at the opening of this Brief. *Bakke* is another societal expression that says past and present discrimination is wrong; and government may act to remedy that wrong, and that the Constitution permits remedial steps even if they are race conscious, so long as it is clear that the governmental purpose served is vital and compelling, and so long as the mechanisms used relate to that purpose and are not themselves offensive.

16. *University of California Regents* v. *Bakke*, 438 U. S. 265, 57 L. Ed. 750, 98 S. Ct. 2733 (1978).

17. Justice Powell wrote that "In enjoining petitioner from ever considering the race of an applicant, however, the Courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *University of California Regents* v. *Bakke, supra* p. 320.

Bakke did strike down a particular mechanism that the University of California had employed—but it did so only after an analysis thereof on the same standards as are posited to be applicable to this case.

Is the "fault" that required striking down in *Bakke*, the fault in the case at bar? The University had 100 slots for its first year class, but it said that 16 of these slots shall be judged by one standard, and the balance by another standard. The majority of this Court in *Bakke* found this offensive, while at the same time the majority found that race as such may be a valid factor in the determination of all 100 slots.

It is not appropriate here to review the rationale of *Bakke* as such. Suffice it to say that Congress in the case at bar has made no such dichotomy in the set aside program—all must compete equally for each federal grant. Each grant, however, has to satisfy a host of standard qualifications such as bonding, environmental impact, nondiscrimination in employment, area requirements,[18] etc.—plus one more standard, and that is that it also must have a 10% minority business ownership involvement. Whether this involvement is in the ownership of the prime contractor, or in some or all of the subcontractors, or in some or all of the suppliers is not specified or dictated. The "evil" of the separate classifications and separate testing in *Bakke* is not present in the case at bar.

Petitioner in a litany of quotations from various of the opinions in *Bakke* would invite this Court to believe that on the basis of something that was said in *Bakke*, rather than anything that was done in *Bakke*, there is a contraint on this Court now to invalidate the set aside program. A review of quotations from Justice Powell illustrates the point that such quotations do not accomplish Petitioner's objective.

Justice Powell is quoted as indicating that "racial . . . distinctions are inherently suspect" and Justice Powell cites a my-

18. See the Regulations of the Secretary of Commerce, 13 CFR 305.94 (as to Bonds), 13 CFR 112 and 113 (as to employment discrimination) and 13 CFR 309.18 (as to environmental impact).

riad of examples to support this. This position is, of course, precisely why the District Court in this case and the Court of Appeals in this case devoted significant portions of their analysis just because this proposition is necessarily so.

Justice Powell is quoted as stating that there must be a "judicial, legislative or administrative finding".[19] We have in this Brief already developed at length on the nature of the legislative findings in this case, both implicit and explicit.

Justice Powell is quoted for his conclusion that the classification adopted must be "tailored" to serve the identified compelling governmental interest.[20] We have indicated how the set aside fits snugly and primly the basic objective of a remedy for past and present discrimination.

Finally, Justice Powell is quoted as to his comments that the mechanisms chosen can not "force innocent persons . . . to bear the burdens of redressing grievances not of their making.[21] Just how minuscule the burden of the set side program is on the non-minority contractor was exposed by the articulation of the Court of Appeals in this case and has already been quoted above.

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19. The full quotation is "We have never approved a classification that aids persons perceived as member of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of Constitutional or statutory violations." *University of California Regents* v. *Bakke, supra* p. 307.

20. The full quotation is "When they (Congressional classifications) touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *University of California Regents* v. *Bakke, supra,* p. 299.

21. *University of California Regents* v. *Bakke, supra,* p. 298.

CONCLUSION.

The Minority Business enterprise set aside program became law in an atmosphere of legislative responses to patterns of discrimination past and present against blacks and other minorities. There was little Congressional dialogue as to the program, but this was the Congress that had recognized such patterns of discrimination in the fields of housing, voting rights, health services, employment opportunities, public educational services and had sought to structure programs to respond thereto.

The Minority Business enterprise set aside program is consonant with the judicial standards etched by this Court in its continuing refinement of the Constitutional mandates of due process and equal protection of the laws.

The Minority Business enterprise set aside program is a part of the continuing historic perspective that has emerged from the public concern with discrimination and its remedy. This Amicus Curiae is also part of that public so concerned. It is directed by its precepts, and has shown its dedication through the involvement of its considerable informed human resources and programs that it is deeply committed to the resolution of such patters of discrimination.

This Amicus Curiae respectfully urges this Court to affirm the Minority Business enterprise set aside program because it is a decision that maximizes the political judgment of Congress in its resolution of the realities of discrimination; because it is consonant with the standards for Constitutional interpretation articulated by this Court in its prior decisions; and because it is a reflection of the flow of history toward the obliteration and elimination of the vestiges of discrimination and removal thereof.

Such a decision by this Court would be right therefore, as a matter of political decision; would be right as a matter of judicial development; and would be right for the moral thrust of today's reality and tomorrows vitality.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1007

H. EARL FULLILOVE, ET AL.,
Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

AMICUS CURIAE BRIEF FOR THE MINORITY CONTRACTORS ASSISTANCE PROJECT, INC.

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AMICUS CURIAE BRIEF FOR THE MINORITY CONTRACTORS ASSISTANCE PROJECT, INC. PRESENTED WITH THE CONSENT OF THE PARTIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 23a)[1] is reported at 584 F.2d 600 (2d Cir. 1978). The opinion of the United States District Court for the Southern District of New York (Werker, J.) (Pet. App. 1a) is reported at 443 F.Supp. 253 (S.D.N.Y.1977).

[1] "Pet. App." refers to the appendix attached to Petitioners' Petition for Writ of Certiorari filed December 21, 1978.

INTEREST OF THE AMICUS

Although this case is concerned with the validity of a statute directly affecting the interests of minority contractors, no minority contractor or minority organization was a party to this case in the courts below. In contrast, majority contractors and organizations advocating their interests participated in over twenty court tests of the statute in question.[2]

While it is impossible to calculate the effect of this imbalance in the presentation of views and positions, this brief is offered in the hopes that it will help if only slightly to make the presentation of views in this case by private parties somewhat less onesided.

The Minority Contractors Assistance Project, Inc. (MCAP) is a private nonprofit corporation created in 1970 to help minority contractors compete for a more equitable share of the nation's construction industry.

In recognition of the need for a national effort to help increase minority contractor participation in the industry, the Ford Foundation asked the National Urban Coalition to design an assistance program. After a year of research and development, MCAP was created as an autonomous organization directed primarily by respresentatives of minority economic development organizations but with representation also from majority businesses and from organized labor.

Using funds borrowed from five major life insurance companies, MCAP has guaranteed almost $6-million in working capital loans in cities across the nation. During the past two years MCAP has applied computerized systems for bidding and

[2] According to the General Accounting Office study of the implementation of the statute, the Associated General Contractors and/or its local chapters brought 23 of the 27 court actions challenging the statute. Comptroller General's Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9, January 16, 1979, p. 35, hereafter referred to as GAO Report.

estimating and for managing and controlling costs and production on minority construction contracts totaling over $50-million.

During that period MCAP also helped minority contractors obtain some $30-million in surety bonding, much of it underwritten by a subsidiary company, MCAP Bonding & Insurance Agency, Inc., which operates under agency agreements with three major national insurance companies.

Operating out of offices in Washington, D.C., Atlanta and Los Angeles, MCAP has provided technical management or financial assistance to over 5,000 minority contractors in every section of the nation. In the process it established working agreements or arrangements with over 20 minority contractor groups and an even larger number of banks and surety agencies.

MCAP frequently conducts workshops and training seminar for contractors on ways to improve their operations, their financial position and their bonding capacity.

Most of the operating funds for this activity has been provided through the Office of Minority Business Enterprise at the Department of Commerce and the Minority Business Resource Center at the Department of Transportation. In addition MCAP works closely with the Small Business Administration's surety bond guarantee program and other public and private programs that impact on minority contractors.

Because of its experience, MCAP on occasion is called upon to testify before various congressional committees on the problems of minority contractors, and is consulted informally by congressmen and members of their staffs.

Thus by virtue of its organizational purpose, the allocation of its resources and its experience and programs, MCAP has an interest in a full and fair consideration of the issues in this case.

A ruling by this court that the statute in question is invalid could have a devastating impact not only upon the prospects of

also upon a host of public and private programs designed to overcome the effects of racial and ethnic discrimination and to help provide jobs and income through minority business development.

SUMMARY OF ARGUMENT

The courts below properly held that the minority business enterprise provision (Section 103 (f) (2), hereafter referred to as the MBE provision, of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), is not unconstitutional and does not violate Title VI of the Civil Rights Act of 1964. See also decisions in accord by the Third and the Sixth Circuits. *Constructors Association* v. *Kreps,* 573 F.2d (3rd Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration* ____Fed. 2d____, No. 78-3053 (6th Circuit, July 7, 1979).

The MBE provision comes under the powers conferred upon Congress by the Thirteenth and Fourteenth Amendments, which sets this case apart from the circumstances of the *Bakke* case. *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), 46 U.S.L.W. 4896, 4904. As noted by Mr. Justice Powell in that case, "We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial action." *Regents of the University of California v. Bakke, supra.* 98 S.Ct. at 2755 n. 41. and cases there cited, *Katzenbach v. Morgan,* 384 U.S. 641 (1966) and *Jones v. Alfred H. Mayer,* 392 U.S. 409 (1968).

Notwithstanding the deferance which may be due Congress as a separate branch of government as it acts to "abolish all badges and incidents of slavery," (*Civil Rights cases,* 109 U.S. 3, 20 (1883)), the courts below viewed the racial classification in the LPW provision "suspect" and subjected it to a test of "strict scrutiny," which petitioners agree was the proper standard. Pet. App. 28a; 29a, 30a.

In deciding that "even under the most exacting standard of review the MBE provision passes constitutional muster," the 2nd Circuit Court of Appeals had the full benefit of the opinions of this case in *Bakke, supra,* decided earlier.

This court's subsequent statement that racial classifications are "presumptively invalid and can only be upheld upon an extraordinary justification," in *Personnel Administrator of Massachusetts v. Feeney,* 99 S.Ct. 2282, 2292 (1979) 47 U.S.L.W. 4654, simply restated the rule applied by the court in prior cases cited therein[3] and did not constitute an expanded or revised test. On the contrary the Court's decision in that case upholding an absolute preference granted veterans in state employment supports the decisions of the lower courts.

The construction industry traditionally has provided the stepping stones for entering the American business system. The path has been from craftsman to small entrepreneur to large entrepreneur. For Blacks and some other ethnic minorities, however, the path has been barred by discrimination so pervasive and so persistant as to keep them always at the meager edges of the industry, furnishing the physical labor and competing for the smaller less desirable jobs, usually within the minority community.

This history of discrimination is an established and well-known fact of American life, deeply rooted in the more than 200 years of lawful slavery and nourished through almost another century of state enforced segregation.[4]

In the construction industry, racial discrimination has been especially virulent and resistant to change. For Blacks and other minorities, the first step toward becoming a contractor—mastery of one of the skilled crafts—has been effectively blocked by the concerted efforts of white craftsmen.

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[3] Brown v. Board of Education 347 U.S. 483; McLauglin v. Florida, 379 U.S. 184.

[4] The separate opinion of *Mr. Justice Marshall in Bakke, supra,* provides a concise account of this "well known" history, which included denial of the "opportunity to become. . .engineers. . ."

Long before the era of powerful building trades unions and trade associations with their awesome financial resources, communications outlets and cadres of lobyists, white craftsmen would walk off the job rather then allow a free Negro to practice a skilled craft, and white employers would agree to the demands of the white workers.

The discriminatory attitudes and practices that were developed during the slavery period have continued to the present despite sporadic and sometimes heroic efforts to overcome them. Discriminatory and negative attitudes and action toward minorities in construction have not been confined to majority contractors and labor orgainizations but have influenced minority contractors' ability to secure loans, surety bonds and public contracts.

As will be discussed more fully below, numerous findings on the basis of formal hearings by the courts, congressional committees, and federal and state administrative bodies attest to the difficulties minorities have encountered and continue to encounter in the construction industry. This includes regular hearings on measures and appropriations on programs to assist minority business.

Less formal studies, magazine and newspaper articles, books, television programs, essays and law review articles have chronicled the problems of minorities in the construction industry and contributed to congressional and public awareness of those problems.

The result of such discrimination, past and present, is the continued substantial underrepresentation of minorities in the contract construction industry and in the skilled trades that lead to contracting. These conditions have remained despite the fact that the construction industry has doubled in size during this decade, increasing from $100-billion to over $200-billion in annual gross receipts. They have been relatively impervious to a variety of public and private efforts to counter discrimination.

Minority underrepresentation in the construction industry unquestionably has contributed significantly to disproportionately low income levels. Indeed denial of opportunity in this area is especially frustrating and embittering and has been the subject of urban unrest, demonstrations and disturbances.

The MBE proviso improved the Act's ability to reduce unemployment, which was its major goal. The provision also served the purpose of assuring that minority business would not be almost totally excluded from this public works building program and thus it helped the Act meet the "simple justice" goal enunciated by Senator Humphrey and approved by the Court in *Lau v. Nichols,* 414 U.S. 563 (1974).

Great weight should be given to a House Subcommittee's finding that the lack of minority business participation in the construction industry in particular "could be attributed to a business system that is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, 182-83 (November, 1976).

Considering the entire record before Congress additional findings on the linkage between discrimination and the extraordinary problems of minority unemployment and business underrepresentation were unnecessary and would have been redundant. Discrimination may be subtle and usually must be inferred and such problems may call for extraordinary or even race-sensitive solutions regardless of whether there are precise findings as to their exact cause.

The means chosen by Congress to remedy such discrimination were appropriate and the least obtrusive that could have been effective. Further the means were in keeping with the remainder of the Act which was designed for expedited implementation in order to make its benefits quickly felt.

As noted by the courts below, the MBE provision applied only to a small fraction of total construction or total public construction. The effect was to integrate for a limited time and to a limited extent public activity that has been almost exclusively segretated in the past.

ARGUMENT

I. THE MBE PROVISION IS A VALID EXERCISE OF CONGRESSIONAL POWERS UNDER THIRTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION.

A. Past Discrimination

Racial discrimination in the construction industry was an integral part of the system of slavery that obtained in America for more than two centuries. In one of the earliest accounts of the development and dynamics of racial hostility in the building trades, Frederick Douglass, the former slave who became an ambassador, described how the antipathy of white craftsmen to the competition of Negro workers caused him to be severely beaten by white apprentices and forced his withdrawal from an apprenticeship program in which he had been enrolled while a slave in Maryland.[5]

The situation was not much better after he escaped to New Bedford, Mass. While there was little objection to his performance of unskilled work, when he tried to practice his craft, he "was told that every white man would leave the ship in her unfinished condition if I struck a blow at my trade upon her." id. pp. 210, 211.

This pattern of discrimination clearly was covered by the remedial powers conferred on Congress by Section 2 of the Thirteenth Amendment and Section 5 of the Fifteenth Amendment.

The continued history of such discrimination also is well documented.

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[5] *The Life and Times of Frederick Douglass,* MacMillan Publishing Co. (1962 edition) pp. 179,180.

Indeed a substantial body of literature has developed on the difficulties encountered by minorities in obtaining equal employment opportunity. Booker T. Washington and W.E.B. DuBois were early commentators, Booker T. Washington "The Negro and The Labor Unions," *Atlantic Monthly* (July, 1913), pp. 756-767; W.E.B. DuBois "The Economic Future of the Negro," *American Association Publications,* 3rd Series (February, 1906) pp. 219-242.

Interest in minority difficulties has continued through the depression to the present. See *The Black Worker,* by Sterling D. Spero and Abram Harris; Columbia University Press, (1931), and *The Negro in Organized Labor,* by Ray Marshall; John Wiley and Sons, Inc. (1965).

It appears to be generally recognized that the building trades are the area where dualism and discrimination have remained the most intractable. Bayard Rustin, recently defending the general record of organized labor with regard to minorities, wrote also of the "terrible racial conflict in the building trades." "The Blacks and the Unions", *Harpers Magazine,* (May, 1971), reprinted in *Down The Line,* Quadrangle Press (1972) pp. 335-349. See also a discussion of the so-called Philadelphia Plan, "Who failed in Philadelphia", by Nick Kotz, first published in the *Washington Post* and reprinted in *Constructor* magazine, January, 1971 issue, and the "Unchecked Power of the Building Trades," *Fortune* magazine, December 1968.

More recently, a General Accounting Office sudy confirmed the continued existence of discrimination among the skilled craft unions, as well as failure of Federal efforts to effect change. *Comptroller General's Report to the Congress,* "Federal Efforts to Increase Minority Opportunities in Skilled Construction Craft Unions have had Little Success." HRD-79-13, March 15, 1979, hereafter referred to as GAO Report on Craft Unions. The study found that "(h)istorically and traditionally" few minorities have worked in the unionized skilled construction crafts for "various reasons, including such discriminatory prac-

tices as nepotism and racial exclusion." The GAO study also found that minorities made little progress in increasing their participation, moving from 7.2 percent in 1972 to 8.4 percent in 1976. The GAO reported that minority union craftsmen earned less than their white counterparts and that minorities usually were forced to complete apprenticeship programs to become journeymen whereas whites became journeymen more easily without apprenticeship training. The study attributed the disparity of earnings and the lack of membership progress to ineffective enforcement and inadequate monitoring by Federal agencies and to racial discrimination.

A study by the Department of Housing and Urban Development, based on in-depth interviews of minority contractors, noted that "with virtually no exception the route to entrepreneurship as a general or specialty contractor begins with entry into a skilled trade." *A Survey of Minority Construction Contractors,* (1971), HUD, hereafter referred to as HUD Survey.

As an example of the "well documented" exclusion of minorities from skilled crafts, the HUD Survey asserted that a June, 1968, Senate report to the Joint Economic Committee "stated plainly that 'except in very marginal circumstances, and in unskilled categories, the contruction labor force (at this point in time) is lily white.' It further stated that 'no programs are under way and no changes are in the works at the present time which will result in a balanced construction labor force with appropriate proportions of minority workers in the years immediately ahead.'"

Minority craftsmen who had succeeded in becoming contractors reported that they encountered racial discrimination in their dealings with surety bonding and Federal contracting officials, according to the HUD Survey. It noted that around 15 percent of the contractors surveyed listed racial discrimination as among the main obstacles to obtaining jobs, and 64 percent advocated legislation against discrimination.

A 1975 report to the Congress by the U.S. Commission on Civil Rights depicts the paltry share of government procurement from minority businesses in the absence of the MBE provision under consideration. Despite Executive Orders and affirmative action programs calling for minority participation, minority firms received at best only 0.7 percent of Federal procurement in 1972 and possibly only 0.5 percent, the Commission found. U.S. Commission on Civil Rights Report, *Minorities and Women as Government Contractors,* May 1975, hereafter referred to as Commission Report.

State and local governments purchased $62.5-billion in goods and services from the private sector in 1972, the Commission Report found, which was $5-billion more than the Federal government purchased and amounted to 5.5 percent of the gross national product. However, only 76 of 137 such jurisdictions responded to the Commission's survey and these reported minority and female-oriented firms combined received less than 0.7 percent of their procurement dollars. Commission Report, *supra,* p. 86.

The report also observed that "a substantial portion of all Federal contracts are awarded through negotiation procedures," rather than by competitive bidding, and noted that almost 60 percent of Department of Defense procurement in fiscal 1972 was through "sole source" contracts. Commission Report, *supra,* p. 18.

Because Federal procurement officials have broad lattitude with regard to evaluating bids and the capabilities of prospective government contractors, the Commission interviewed such officials and found that some openly expressed hostile and negative attitudes toward minorities and toward programs intended to assist them. Commission Report, *supra,* p. 20, 21.

The Commission also found that a Federal minority subcontracting program for direct procurement[6] was intended

[6] 41 C.F.R. 1-1.1310-1; 32 C.F.R. 1-332.1.

to encourage smaller prime contractors to use their "best efforts" to utilize minority subcontractors, and to get larger prime contractors to develop affirmative action plans, but had been ineffective for a variety of reasons. Commission Report, *supra,* p. 79-84.

Affirmative action subcontracting programs under Executive Order 1126 as amended[7] for federally financed construction had not been enforced and neither had there been much enforcement of a circular by the Office of Management and Budget[8] calling for positive steps to ensure use of minority businesses by prime contractors. Commission Report, *supra,* pp. 90-93.

The Commission also evaluated the Small Business Association's 8(a) set-aside program[9] for small businesses owned by "socially or economically disadvantaged" persons and found that, while the program had potential, it had procured for such firms only a "minute fraction" of total Federal procurement.

The Maryland State Advisory Committee to the Civil Rights Commission earlier had held hearings and had issued a report to the Commission on discrimination in the construction industry in that state. *Employment Discrimination in the Construction Industry in Baltimore,* Report of the Maryland State Advisory Committee to the U.S. Commission on Civil Rights, February 1974, hereafter referred to as the Advisory Committee Report.

The Advisory Committee noted that in 1964 it had reported that discrimination in employment "may well be the decisive factor in the tense racial situation in Maryland," and that only

[7] Executive Order 11246 (Sept. 24, 1965), amended by Executive Order 11375 (Oct. 13, 1967).

[8] Office of Management and Budget Circular A-102, Attachment O, Sec. C (3) (October 1971).

[9] The Small Business Act of 1953, Section 8(a) 15 U.S.C. 637(a), 13 C.F.R. 124.8

"limited gains" had been made since then. Advisory Committee Report, *supra,* p.1. Congressman Parren J. Mitchell of Maryland, who later introduced the MBE provision under review in this case, participated in the Advisory Committee's hearings and advocated the development of an affirmative action plan for Baltimore that would include a provision that "Black contractors should receive 30 percent of Federal and federally-assisted contracts." Advisory Committee Report, p.36.

This long history of discrimination in the construction industry and of ineffective programs to combat it has contributed to the measurable differences in the well being of racial and ethnic groups. See, e.g., *The Social and Economic Status of the Black Population in the United States,* An Historical View, 1790-1978, Current Population Reports Special Studies Series P-23 No. 80, U.S. Department of Commerce, Bureau of the Census. This study charts, among other things, the disparity in unemployment rates (roughly double the white rate) and income levels for the minority population over a period of many years.

Studies noted by the courts below (Pet. App., 38a, note 14) illustrate the underrepresentation of minority firms in the contract construction industry. Thus, according to the Census Bureau's study of the total construction industry in 1972, there were 920,806 firms with revenues totaling $164.4-billion.[10] The Bureau's report on minority business showed 39,875 firms with receipts totaling $1.2-billion, well under one percent of the industry total.[11]

Such disparities in business participation and income by minority businesses which represent 17 percent of the population and on whom a substantial proportion of that population

[10] U.S. Bureau of the Census, *1972 Census of Construction Industries:* Industries Series, United States Summary-Statistics for Construction.

[11] U.S. Bureau of the Census, 1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses, Table 1 (May 1975).

must rely for employment, income and services, were the subject of numerous hearings by Congressional committees.

Specific findings of discrimination frequently have been made. Thus the House Select Committee on Small Business conducted hearings in 1971 and 1972 and concluded that "the minority businessman does not play a significant role in our economy" due to major problems which, though "economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." p. 3, H. Rept. 92-1615 (Oct. 18, 1972) and H. Rept. 92-1626 (Dec. 21, 1972).

The Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business held hearings in 1975 on minority enterprise and found that such firms realize only .065 percent of business gross receipts and stated that "the presumption must be made that past discriminatory systems have resulted in present economic inequities." p. 2, H. Rept. 94-468 (Sept. 10, 1975).

The House Committee on Small Business later adopted the Subcommittee's findings and in a 1977 report concluded that "the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate those past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular." p. 182, H. Rept. 94-1791 (Jan. 3, 1977).

The Subcommittee on Minority Enterprise and General Oversight of the House Committee on Small Business, after hearings in April, May and June of 1977 found that women generally are precluded from "equitable participation in our economy as business owners" due to sex discrimination, and

that minority women in business have unique problems due to "the double stigma of being both minority and female." pp. 23-25, H. Rept. 95-604 (Sept. 15, 1977).

Congress also has received messages from the President requesting measures to remedy discrimination by aiding minority business enterprise, H. Doc. 92-69, (Oct. 13, 1971); H. Doc. 92-194 (Mar. 20, 1972). Presidential Executive Orders also have been premised on the fact that minorities have been denied opportunities to participate in the business system. See Presidential Executive Order 11518, 35 Fed. Reg. 4939, Mar. 20, 1970, CFR 1966-1970 Compilation, p. 907 and Presidential Executive Order 11625, 36 F. Reg. 19967.

Subsequent to passage of the MBE provision Congress has reiterated its belief that discrimination against minorities should be remedied through Federal procurement contracts. See House-Senate Conference Committee Report, H. Rept. 95-1830, (Jan. 2, 1979); Senate Select Committee on Small Business Report, S. Rept. 96-31, (Mar. 7, 1979).

Executive agency reports, as noted above, frequently have referred to racial and ethnic discrimination as creating a need for minority business development. See, e.g. *Building Minority Enterprise* (1970), the Office of Minority Business Enterprise, Department of Commerce, referring to discrimination by "suppliers, unions and lenders;" and *Minority Enterprise and Expanded Ownership: Blueprint for the 70's* (June, 1971), President's Advisory Council on Minority Business Enterprise which states that "enormous economic inequities, the product of centuries of disregard, discrimination, and institutional racism, still exist . . ." p. 5, and surveys historical reasons for paucity of minority business enterprises and stresses the impact of racial discrimination on Afro-Americans and Americans of Spanish ancestry. pp. 10-18; *Minority Ownership of Small Business: Thirty Case Studies* (1972), Department of Health, Education, and Welfare, which gives actual case histories, including apparent instances of racial discrimination; *Progress Report: The*

Minority Business Enterprise Program 1972 (Oct., 1972), Office of Minority Business Enterprise (OMBE) Department of Commerce, cites "prejudice" and "the chill winds of exclusion" as limiting the entry of minorities into the business system. p. 3; *Limited Success of Federally Financed Minority Businesses in Three Cites* (1973), General Accounting Office, which examines effect of various Federal programs to aid minority businesses and cites "racial discrimination" as one factor that has limited the opportunity for minority ownership of business. p. 5; *Report of the Task Force on Education and Training for Minority Business Enterprise* (Jan., 1974), OMBE, Dept. of Commerce, which notes that "decades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system." p. 17; *Minority Enterprise Progress Report* (Jan., 1976), OMBE, Dept. of Commerce, in which Secretary of Commerce Elliot Richardson stated that ". . . since minority groups start from behind the power curve because of past discrimination, they deserve whatever extra assistance all of us can give them in order to have a reasonable chance of success;" *Federal Procurement and Contracting Training Manual for Minority Entrepreneurs* (May, 1975), OMBE, Dept. of Commerce notes effects of discrimination on minority business and states that "there has been a severe shortage of potential minority entrepreneurs with general business skills as a result of the minorities' historic exclusion from various sectors of our economy" pp. 38-39.

In addition to the above, there is a considerable body of court findings of racial discrimination in employment, including the construction industry. See, e.g. Pet. App., 16a note 17 and the cases cited therein, and *Steelworkers v. Weber,* 47 U.S.L.W. at 4852 n.1.

Further, there is a substantial volume of relatively recent civil rights legislation enacted by Congress as a result of its findings of persistent racial discrimination in various institutions

and aspects of our national life. See Pet. App., 32a, note 7 for a comprehensive listing.

B. Congressional Purpose

There can be little doubt that Congress added the MBE provision to the Local Public Works Employment Act in an effort to offset the effects of past discrimination, which if left unremedied would have robbed the Act of much of its effectiveness. The statements of the sponsors clearly connect the MBE provision to a record of discrimination so familiar and so odious that the proposed remedy touched off little discussion or debate except as to the mechanics of its application.

Senator Brooke, who was joined by a bipartisan group of eight Senators, in offering his version of the provision spoke of the importance of focusing "on the unemployment experiences of different racial and ethnic groups," which he said normally are double the unemployment rate of white citizens. He said it was "entirely proper, appropriate and necessary" to set aside a "reasonable percentage of the public works job funds to go to qualified minority contractors." Senator Brooke explained that this was necessary because minority businesses "have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative action efforts." He also urged "the set-aside concept as a legitimate tool to insure participation by the hitherto excluded or unrepresented groups."

Senator Brooke asserted that this was an "appropriate concept because minority businesses are principally drawn from residents of communities with severe and chronic unemployment," adding that a healthy minority business sector would be required for progress in dealing with these problems. Congressional Record S.3910, March 10, 1977.

Earlier in the House, Congressman Mitchell of Maryland, in introducing The MBE provision said it was intended to provide a "fair share of the action" to minority business and

spoke repeatedly of the "denial" of government contracts to minorities, which he said was evident from the fact that minority firms participated in only about 1 percent of Federal procurement. He also maintained that allowing minorities to do business with the government would eventually allow reduction in Federal spending for survival support programs. Congressional Record H. 1436, 1437, Feb. 24, 1978.

Congressman Conyers urged passage on the grounds that minority contractors "get the works" when they engage in the competitive bidding process. Congressman Biaggi commented that the Nation's record with respect to minority business is "a sorry one". He pointed out that unemployment among minority groups was "running as high as 35 percent, and said that without the provision the legislation was "potentially inequitable to minority business and workers." Congressional Record, H. 1440, Feb. 24, 1977.

Clearly these speakers and those who indicated their agreement with them were addressing compelling national concerns that were caused or aggravated by unequal experience on the basis of race. It was conceded by petitioner that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination" (Pet. App. 29a), and the record clearly supports the conclusion that this was indeed Congress' intent.

C. Means Employed

In fashioning the remedy of mandatory minority participation in the Local Public Works Employment Act, Congress was mindful of the fact that a number of other remedies had been tried but had failed to effect a cure. As this court recently observed in *United Steelworkers v. Weber, supra*, the problem of nonwhite unemployment addressed in the Civil Rights Act of 1964 was still with us in 1978, 47 U.S.L.W. 4854, note 4.

In upholding the validity of a private negotiated plan that reserved for Black workers 50 percent of the openings in a craft

training program, the Court in that case relied in part on the fact that the plan was temporary and that it did not create an absolute bar to white advancement.

The remedy in the present case was even more limited in terms of duration and it permitted white contractors to continue to get a disproportionately large percentage of contracts under the Local Public Works Employment Act. It had no effect at all upon the great mass of Federal procurement. Further the MBE provision did not impose rigid and unduly obstructive standards upon the state and local jurisdications but allowed great flexibility in the implementation of the provision and allowed for waiver of the requirement by the Secretary of Commerce in the areas where capable minority firms were not available.

While hindsight might offer opportunities for a more elaborate remedy, the simplicity and directness of the present mandate was in keeping with the general tenor of the statute, which was intended to provide employment benefits in rapid fashion. See GAO Report, *supra*, p. 37.

GAO's study found a number of positive results from the program and indicated that it had been far more successful than other programs in securing minority contractor participation in Federal procurement. Thus data on SBA's 8(a) procurement program indicated that only $459-million in construction contracts had been channelled to minority firms over a 12-year period, as compared to $634-million during the short period of the local Public Works Employment Act. GAO Report, p.9.

GAO also found that 90 percent of the majority prime contractors conceded that the work performed by minority firms was acceptable, but only 30 percent of the white contractors were willing to consider using the minority contractors on future jobs and give them the opportunity to submit bids. The GAO Report thus confirms both the necessity for and the wisdom of the mandatory MBE provision.

Congress acted in conformity with the Court's ruling in *Lau v. Nichols, supra,* that "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any way which encourages, entrenches, subsidizes, or results in racial discrimination."

II. CONCLUSION

For the reasons set forth above, the Minority Constractors Assistance Project, Inc., respectfully submits that the Decision of the Second Circuit Court of Appeals be affirmed.

Dated: Washington, D.C.
October 9, 1979

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,
Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

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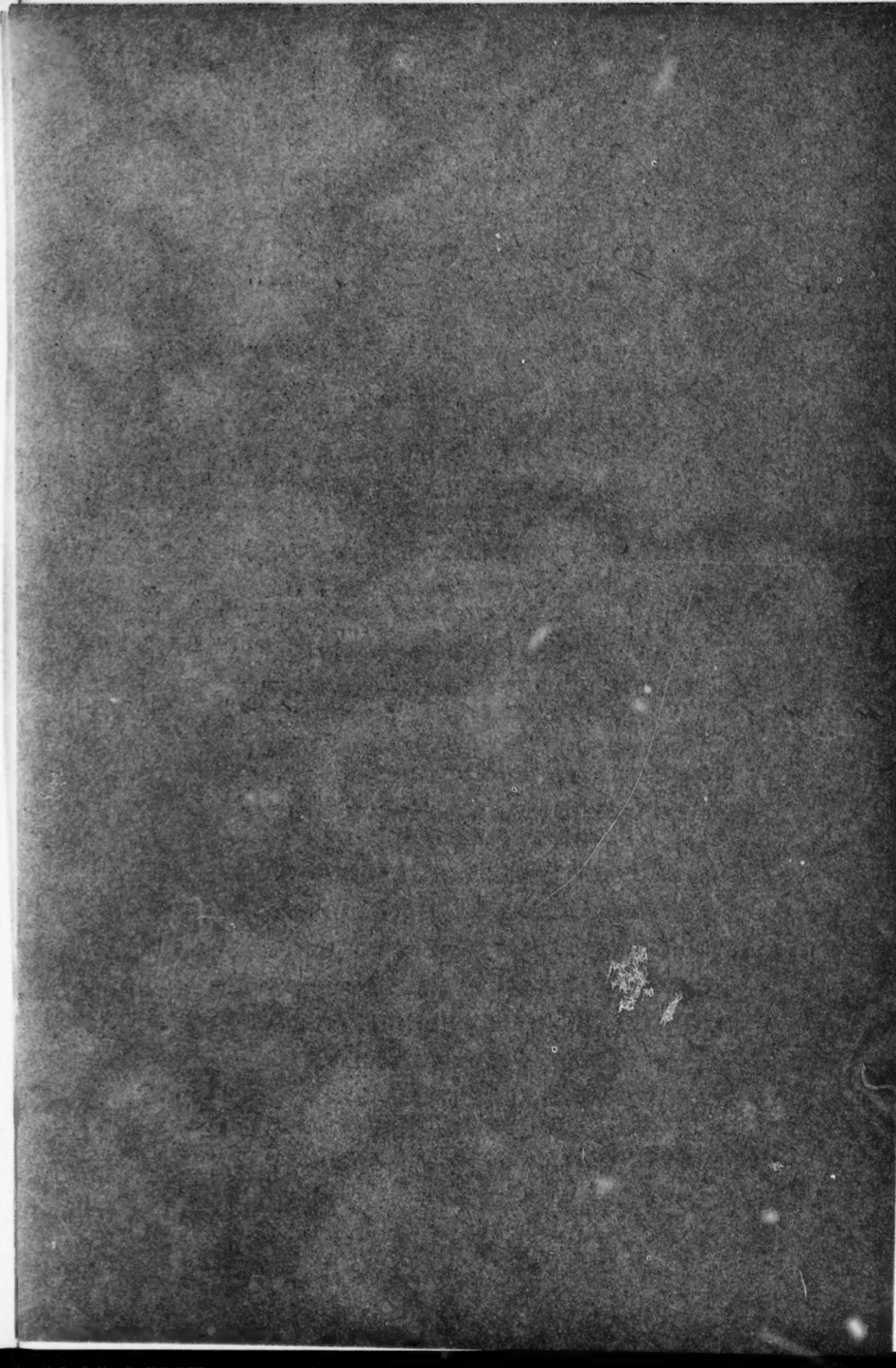
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THE SUBURBAN ACTION INSTITUTE

TRY U.S.: NATIONAL MINORITY BUSINESS CAMPAIGN

THE URBAN LEAGUE OF GREATER NEW HAVEN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,

v. *Petitioners,*

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS THE CENTER FOR URBAN LAW, ET AL.

CONSENT OF PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Respondent. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The fifty organizations joining in this brief as *amici curiae* (see appendix) represent many sections of American society and have many diverse interests. They share a mutual hope that the Court will use the instant case to advance and not to set back the struggle to rid our nation of the haunting spectres of racial discrimination, racial hatred.

The groups share a common concern about the continuing exclusion of minorities from the economic mainstream which is the legacy of slavery and discrimination. They are aware that affirmative action set-asides such as the "minority business entreprise" provision contained in the Public Works Employment Act of 1977 are important vehicles by which to begin the long process of remedying this historic exclusion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case is the third in as many terms to present this Court with an opportunity to pass upon the validity of race-conscious policies adopted to alleviate a portion of the burden imposed by this country's sad history of racial oppression. In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the Court was presented with a state university admissions policy which reserved a number of seats for qualified minority applicants. In *Weber* v. *Kaiser Aluminum*, —— U.S. L.W. ——, the contest involved an employee who objected to an agreement between a private employer and union to reserve for minority employees one-half of the positions in a newly-established training program.

In this case, Petitioners would have the Court do what it has not done in almost one hundred years—strike down as unconstitutional a congressional enactment designed to address the very evils to which the Civil War Amendments to the Constitution were directed. Not since the *Civil Rights Cases of 1883* has the Court sought to narrowly constrain the power of Congress to eradicate the remnents of American slavery.

By asking the Court to step back a full century, the Petitioners invite the Court to ignore the lessons of history and to deny the importance and intractability of America's continuing problems in race relations.

In the courts below and in the briefs submitted to this Court, Petitioners advance a narrow Fourteenth Amendment argument assuming erroneously that the sole justification for race-consciousness must be the remediation of past discrimination. At its core, Petitioners' arguments reveal a fundamental misunderstanding about the role of the Court when presented with a challenge to the constitutionality of a congressional enactment. The Court does not pass on the appropriateness of the congressional action. Rather, the Court quite properly defers to Congress and affords the legislation a presumption of constitutionality and effect if a permissible basis can be found.

The Thirteenth Amendment to the Constitution provides the requisite basis to support the legislative enactment being challenged.

Amici will argue that the Minority Business Enterprise (hereinafter cited as MBE) provision challenged by Petitioners is an appropriate exercise of congressional power pursuant to the Thirteenth Amendment mandate abolishing slavery, its relics, badges and incidents. We will establish that the exclusion of Blacks and other minorities from the economic mainstream is a direct result of slavery and as such can be cured by direct congressional action pursuant to the Thirteenth Amendment.

Although this brief will focus primarily on the historical treatment of Black Americans, *amici* contend that the victimization by the dominant White society of people of color in this nation triggers the protection of the Thirteenth Amendment in much the same manner as the historical relationship emanating from the slave system. To legitimize the brutal slave system, the doctrine of white supremacy developed to rationalize the total subjugation and dehumanization of the Black race by the white race.

Thus, the doctrine of white supremacy is a relic of slavery. Since other minorities have been victimized by the relic of slavery—white supremacy—it is appropriate that Congress develop remedies which include these groups even though they were not the original, intended beneficiaries of the Civil War Amendments.

ARGUMENT

THE MBE PROVISION OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 IS AN APPROPRIATE EXERCISE OF CONGRESSIONAL POWER PURSUANT TO THE THIRTEENTH AMENDMENT MANDATE TO ERADICATE THE BADGES AND INCIDENTS OF SLAVERY.

The Thirteenth Amendment can be activated to ameliorate existing disparities when a nexus to the institution of slavery can be found. In the instant case, that nexus is clear. "The severe shortage of potential minority entrepreneurs with general business skills is a result of . . . historical exclusion from the mainstream economy." *Fullilove* v. *Kreps*, 584 F.2d 600, 606 (2d Cir. 1978) (quoting Office of Minority Business Enterprise, U.S. Dept. of Commerce, Minority Business Opportunity Hand-Book [August 1976]). Any but the most cursory and insensitive appraisal of American history would establish that the existing exclusion of Blacks and other minorities from the economic mainstream, and from the construction industry in particular, is due to the continuation and institutionalization of a pervasive pattern of officially-sanctioned policies, procedures and practices. These acts were an integral part of the institution of slavery which survived and even continued in different form despite the abolition of slavery.

A. Exclusion From The Economic Mainstream Was An Integral Aspect Of The Institution Of Slavery.

Any system of human bondage must impose substantial burdens upon and severely constrain the opportunities of the enslaved individual or group to participate effectively in a competitive economy. Even so, slavery American-style contrived to compound these inherent constraints through a complex pattern of legal strictures which collectively mandated the economic isolation of people of color. The positive law of the several states denied Blacks the opportunities to own, rent or otherwise acquire property, to acquire marketable skills through gainful employment, or to engage in trade and commerce.

It is important to understand at the outset that exclusion from the economic mainstream was more than merely incidential to the institution of slavery. This exclusion was an integral part of and critical to the very survival of slavery. A. Leon Higginbotham noted that "the control the court sought was the total submission of Blacks." A. L. HIGGINBOTHAM, IN THE MATTER OF COLOR at 9 (1st ed. 1978). Complete subjugation was considered *sine qua non* to the maintenance of slavery. Higginbotham recounts how Frederick Douglass described the underlying motivation.

> Beat and cuff the slave, keep him hungry and spiritless, and he will follow the chain of his master like a dog, but feed and clothe him well, work him moderately and surround him with physical comfort, and dreams of freedom will intrude . . . You may hurl a man so low beneath the level of his kind, that he loses all just ideas of his natural position, but elevate him a little, and the clear conception of rights rises to life and power, and leads him onward. *Id.*

William Goodell explained the need for total subjugation in yet another way.

> If the slave could possess property, he could dispose of it, he could make contracts; he might contract marriage; he might become a man, and, in becoming such, cease to be a slave. *The safety of the entire fabric required that not one stone in the edifice should be missing.* (emphasis added) W. GOODELL, THE AMERICAN SLAVE CODE at 96 (1st ed. 1968).

The right to contract, which is the right preservative of all other economic rights, was denied by law to all slaves except in one instance.

> The only case in which slaves can contract on their account, is for their emancipation. Act of 1825, Louisiana Civil Code, Art. 1783 (1925).

Ironically, this competence to contract for emancipation provided an equally compelling and far more immediate concern about allowing slaves to participate in meaningful economic activity. Consistent with the conception of slaves as property,[1] some jurisdictions allowed slaves to contract to purchase their freedom by paying their master a sum of money.[2] Without laws making it virtually

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[1] The slave codes of several states expressly conferred upon slaves the status of property. In Louisiana, slaves were considered to be real estate and as such subject to being mortgaged. Act of 1806 (Black Code) Laws of Louisiana, at 101-102 (1806). Alabama and South Carolina, however, recognized slaves to be chattel property. Act of 1852, Code of Alabama, at 390 (1852); Act of 1740, Statutes at Large for South Carolina, Vol. 7, at 397 (1825). The slave as property had no legal rights to possess anything, real or personal. The master had full rights to sell him, dispose of his person, his industry and his labor. The slave could not possess nor acquire anything that did not belong to his master. The laws were clearly enacted to insure that the slave would never reach a state of independence so to threaten the economic well being of the slaveowners.

[2] *See* BERLIN, SLAVES WITHOUT MASTERS, (1st ed. 1974); Petition from Southampton County, 9 December 1811, Virginia Legislative Papers, Virginia State Library, Richmond, Virginia; Matison, *Manumission by Purchase*, XXXIII JOURNAL OF NEGRO HISTORY, 157-158 (1958).

impossible for slaves to earn and accumulate the agreed upon sum, the number of slaves purchasing their freedom might have undermined completely the institution of slavery and the entire economic system of the region.[3]

It was this twin realization of the fundamental threat posed by a slave population even marginally participating in the economy that led inevitably to the determination to assure complete exclusion.

Slaves, themselves considered property,[4] could own neither personalty or realty. On this point, the statutes were clear and unequivocal.

---

[3] Slaves needed iron determination as well as cold cash to buy their way out of bondage. Slaveholders frequently thought their slaves too good to free. "No sum of Money would induce me to part with Sarah, for she is Sober, industrious & Honest so much so that my wife always finds her things in proper order without much trouble," a Tennessee slave master wrote to a free Negro anxious to buy his wife. Besides, he added, "the Price of Black people is so enormously High in this Country that I could not Replace Such a one as her I Expect for Less than Between Six & Seven Hundred dollars and such a trusty one as She is, is hard to find. . . ." BERLIN at 154.

[4] The master's right to free his slaves shrank as slavery expanded. Manumission had been the primary source of free Negro increase during the post-Revolutionary decades, and Southern legislators worked to curb or abolish the practice. During the nineteenth century, lawmakers dismantled the last remnants of the liberal manumission policies of the earlier era. The older seaboard states added restrictions to their manumission statutes, and the newer states of the Southwest enacted almost prohibitory regulations so that even the few masters who desired to liberate their slaves found it increasingly difficult. By the mid-1830's, most Southern states required slaveowners to get judicial or legislative permission to free their slaves and demanded that newly liberated bondsmen leave the state upon receiving their freedom. Those few states which still allowed slaveowners to emancipate their slaves also stipulated that manumitted Blacks migrate or risk being forcibly deported or re-enslaved. Legislators further discouraged emancipation by requiring masters to remove freed Negroes and by making those manumitted liable to seizure for unpaid debts even after emancipation. BERLIN at 138.

> No slave can own property, and any property purchased or held by a slave, not claimed by the master or owner, must be sold by order of any justice of the peace; one half the proceeds of the sale, after the payment of cost and necessary expenses to be paid to the informer, and the residue to the county treasury. Act of 1852, Code of Alabama, Sec. 1018 (1852).
>
> [N]o person . . . shall suffer or allow any of his or their slaves to plant for themselves any corn, peas or rice, or to keep for themselves any stock of hogs, cattle or horses, under the penalty of twenty pounds current money . . . for every slave so suffered . . . the said penalty to be recovered . . . half to be paid to him or them who will inform and sue for same . . . Act of 1714, Statutes at Large of South Carolina, Vol. 7, at 368 (1840).

The alienation between slaves and property was made complete by prohibiting slaves to acquire or dispose of property through inheritance.

> All free persons, even minors, lunatics, persons of insane mind and the like may transmit their estates and *ab intestato* inherit from others. Slaves alone are incapable of either. Act of 1825, Louisiana Civil Code, Art. 945 (1825).
>
> Every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void. Act of 1841, Statutes at Large of South Carolina, Vol. 11, at 169 (1873).

The ban on owning or otherwise acquiring property, combined with the miscegenation statutes,[5] would guarantee a long term disadvantage in any private property economy.

[5] State laws imposing criminal sanctions for interracial marriage were not ruled unconstitutional until *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) and *Loving* v. *Virginia*, 388 U.S. 1 (1967). *See* J. JOHNSTON, RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH 1776-1860 at 165 *et seq.*, (1st ed. 1970); W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 136-178 (1st ed. 1968); P. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION, at 98-100, 233-6 (1st ed. 1974).

This disadvantage was further compounded by statutes which denied slaves the opportunity to use what little personal time they had to engage in gainful employment. Slaves, masters and potential employers alike were subject to penalty.

> Section 13. No owner of slaves shall hire his slaves to themselves, under the penalty of a fine of five and twenty dollars for every offense. Act of 1806 (Black Code) Lislet's Digest to Laws of Louisiana, Sec. 13 (1828).
>
> [I]t shall be altogether unlawful for any person or persons to hire any male slave or slaves, his or their time; and in cases any male slave or slaves be so permitted by their owners, to hire out their own time, labor or service, the said slave or slaves shall be liable to seizure and forfeiture . . . Act of 1822, Statutes at Large of South Carolina, Vol. 7, at 462 (1840).

Nor could slaves engage in trade or commerce without the consent of their master.

> [I]f any shop keeper, trader, or other person, shall . . . buy or purchase from any slave, . . . any other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care and management of such slave, such shop keeper, trader, or other person, shall, for every such offence, forfeit a sum not exceeding one thousand dollars, and imprison-

> ment not exceeding a term of twelve months, nor less than one month. Act of 1817, Statutes at Large of South Carolina, Vol. 7, at 454 (1840).

Even with the consent of their masters, slaves were excluded completely from some occupations.

> And to prevent, . . . slaves from attaining the knowledge of any mineral or vegetable poison. *Be it further enacted* by the authority aforesaid, That it shall not be lawful for any physician, apothecary or druggist, at any time hereafter, to employ any slave or slaves in the shops or places where they keep their medicines or drugs, under pain of forfeiting the sum of twenty pounds, proclamation money, for every such offence . . . Act of 1751, Statutes at Large of South Carolina, Vol. 7, at 423 (1840).

Thus, deprived of any opportunity for economic self-sufficiency, slaves were made completely dependent upon and subject to the absolute control of their masters.

B. Exclusion From The Economic Mainstream Has Survived Slavery And Continued To Be Used To Deny The Promise Of Freedom.

The mosaic of restrictions which excluded slaves (and in some instances, all people of color) from the economic mainstream did not wither away upon the abolition of slavery. It is clear that the framers of the Thirteenth Amendment and the initial Civil Rights Acts earnestly intended to assure the economic viability of the former slave population.[6] It is equally clear that there were

[6] Slavery, at its root, was an economic phenomenon. Hence, it is not surprising that a prime concern of the framers of the Thirteenth Amendment was the economic well-being of newly freed Blacks. Congress was concerned that Blacks be accorded civil and political rights in order that they could protect and advance themselves economically. The Black Codes—i.e. the legislation passed in Southern states designed to return Blacks to a state of semi-slavery—was never far from the mind of Congress in exacting the anti-slavery amendment. Representative Godlove Orth of Indiana acknowledged that something more than merely the right not to be held as property was involved in abolition and added that the right of "personal freedom without distinction" was involved. Ebon C. Ingersoll of Illinois stressed that the amendment would bring Blacks the right to enjoy the rewards of their labor. James Harlan of Iowa emphasized that the amendment would give Blacks the right to own property—and, strikingly, the right to protect and advance their property rights by the right to bring suit, testify in court and to speak and write freely. Cong. Globe, 38th Congress, 2d Sess., 143 (January 6, 1865); *See e.g.* 38th Congress, 1st Sess. 1463 (April 7, 1864); 38th Congress, 2d Sess., 487 (January 28, 1865). Though there was not unanimity in Congress regarding the plan of some legislators (Sumner, Thaddeus Stevens, George Julian, Benjamin Wade, *et al.*) to allocate land to the freedmen, there was recognition that "special measures" had to be taken if Blacks were not to fall back into a second-class economic status. Congressional reports and documents of that era are replete with this concern. House Executive Documents, Report of the Secretary of the Treasury on the State of the Finances for the Year 1864: General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen; [No. 3, 38th Congress, 1st Sess.] Senate Executive Documents, Preliminary Report T8ouching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedman's Inquiry Commission; [No. 53, 38th Congress, 1st Sess. (1864)]. Senate Executive Documents, "Final Report of the American Freedmen's Inquiry Commission to the Secretary of War [No. 53, 38th Congress, 1st Sess. (1864)]. The Freedmen's Bureau was both the clearest expression of congressional concern about the economic plight of the freedmen and the clearest expression of the reach of the Thirteenth Amendment. Though some have argued otherwise, it is certain that the Freedmen's Bureau was seen as a concrete realization of the anti-slavery amendment and was based upon it; *See* G. BENTLEY A HISTORY OF THE FREEDMEN'S BUREAU, at 117, (1st ed. 1955). This was the view of conservative, moderate and so-called "radical" Congressmen alike. This is also the view of the two leading authorities on the Freedmen's Bureau and post-bellum land reform. *Compare*, W. ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT, (1st ed. 1965); W. MCFEELY, YANKEE STEPFATHER: GENERAL O. O. HOWARD AND THE FREEDMEN, at 199, 267 (1968); *See also*, MCFEELY, UNFINISHED BUSINESS: THE FREEDMEN'S BUREAU AND FEDERAL ACTION IN RACE RELATIONS, KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE, Vol. II, at 5 (Huggins, Kilson & Fox ed. 1971). Congress recognized and

those who were determined that the Black population would be forever second class—no more than "hewers

of wood and drawers of water."[7] Clearer still is the realization that in the period following, the brief respite known as the Reconstruction Era, it was the latter who prevailed.[8]

> During 1865 and 1866 [Southern lawmakers] enacted the Black Codes as a system of social control that would be a substitute for slavery, fix [Blacks] in a subordinate place in the social order, and provide a manageable and inexpensive labor force. A.

the Bureau proceeded to implement the incontrovertible fact that the peculiar status of Blacks as a result of slavery, necessarily meant that peculiar legislation had to be designed to fit their needs. In that sense, the Freedmen's Bureau can be seen reasonably as an early form of what is known today as "affirmative action." Further, the fact that the architects of the Thirteenth Amendment also authored the Freedmen's Bureau, is recognition of the sound *constitutional* basis for "affirmative action."

[7] It is undoubtedly certain that in approving the Thirteenth Amendment and its concomitant, the Freedmen's Bureau, Congress was attempting to affect directly the inferior economic status of Blacks, that the Black Codes were designed to promote. Congress was aware of the South Carolina legislation that forbade Blacks on farms to sell farm products without written authorization; the Mississippi law forbidding Blacks to rent or lease lands outside towns or cities; the special taxes that hit Blacks and Blacks alone; the provisions in virtually every Southern state's code containing detailed provisions on labor contracts, apprenticeship and vagrancy, all tailored to perpetuate a second-class economic status for Blacks. Not incidentally, after the Black Codes were passed, the migration of Blacks from rural areas—where the Codes were developed to maintain them as a form of cheap labor—to the cities was halted. T. B. WILSON, THE BLACK CODES OF THE SOUTH, at 66-80, 96-116 (1st ed. 1952).

[8] In his eloquent opinion in the *Bakke* case, Justice Marshall succinctly described the failure of the Reconstruction Era. "The Southern States took the first steps to re-enslave the Negroes. . . . Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Act . . . Thus, for a time it seemed as if the Negro might be protected from the continual denial of his civil rights . . . That time, however, was shortlived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights." *Bakke*, 438 U.S. at 390-391.

MEIER and E. RUDWICK, FROM PLANTATION TO GHETTO: AN INTERPRETIVE HISTORY OF AMERICAN NEGROES at 138 (1st ed. 1966).

The right to contract, although now not completely denied, was continually burdened:

> All contracts between any persons whatever, *whereof one or more of them shall be a person of color* . . . shall be void as to all persons whatever unless the same be put in writing and signed by the vendors or debtors and witnessed by a *white* person who can read and write. (emphasis added) MCPHERSON, *infra.*

The ability of people of color to seek out gainful employment and to diversify their economic base was constrained severely by vagrancy and apprenticeship laws which combined to make a mockery of the very notion of abolition.[9] Property still could not be bought and sold

[9] The Virginia Vagrant Act of 1866 provided that "in case any vagrant shall, during his term of service, run away from his employer without sufficient cause, he shall be apprehended on the warrant of a justice of the peace and returned to the custody of his employer, who shall then have him, free from any other hire. Among those declared to be vagrants are all persons who, not having the wherewith to support their families, live idly and without employment, and refuse to work for the usual and common wages given to other laborers in the like work in the place where they are."

In ordering the non-enforcement of the Virginia Vagrant Act, General Terry stated, "In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves . . . The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been

by people of color on the same terms and conditions as their White counterparts.[10]

These legal sanctions encouraged, sustained and required widespread private discrimination. Already disadvantaged by restraints on their right to contract, Blacks were further affected by the actions of "landowners and employer's who entered into gentlemen's agreements to refuse to rent land to Negroes." [11] The "gentlemen's agreements" matured into restrictive covenants which were enforceable at law until this Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1947).

Even so, private action in restricting the ability of Blacks to purchase property was not deemed outlawed until this Court acted in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)[12] and the Congress passed the Civil

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emancipated—a condition which will be slavery in all but its name." E. McPherson, The Political History of the United States of America During the Period of Reconstruction (1st ed. 1880).

[10] *See* R. Higgs, Competition and Coercion; Blacks in the American Economy, 1865-1914, at 11-13, 91-92 (1st ed. 1977); Senate Executive Document, No. 6, 39th Cong., 2nd Sess. (1866), Laws of South Carolina, 1865, at 275-276, 292-299; *In re Turner*, 14 Fed. Case 247 (1867).

[11] V. Wharton, The Negro in Mississippi, 1865-1890, at 79 (1947); Bentley, at 104-106

[12] In *Jones*, the Court upheld an effort by Black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section One of the Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold . . . and convey real and personal property . . . as is enjoyed by white citizens . . . ." In resting judicial action upon this statutory basis, the Court was forced to face the ultimate question of the source for congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Kinoy, The Constitutional

Rights Act of 1968.[13]

As a matter of law, specific forms of economic activity were completely closed to people of color.

> [I]t shall not be lawful for a person of color to be the owner, in whole or in part, of any distillery where spirituous liquors of any kind are made, or of any establishment where spirituous liquors of any kind are sold by retail; nor for a person of color to be engaged in distilling any spirituous liquors, or in retailing the same in a shop or elsewhere. A person of color who shall do anything contrary to prohibitions herein contained shall be guilty of a misdemeanor, and, upon conviction, may be punished by fine or corporeal punishment and hard labor, as to the district judge or magistrate before whom he may be tried shall seem meet.

Other fields of employment were open only upon conditions quite different from those imposed on Whites. South Carolina offers this example.

> No person of color shall pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, or any other trade, employment, or business, (besides that of husbandry, or that of a servant under a contract for service or labor,) on his own account and for his own benefit, or in partnership with a white person, or as agent or servant of any person, until he shall have obtained a license therefor from the judge of the district court, which

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Rights of Negro Freedom Revisited: Some First Thoughts on *Jones* v. *Alfred H. Mayer Company*. 22 Rutgers L. Rev. 537, 538-539 (1968) (footnotes omitted).

[13] Civil Rights Act of 1968, Pub. L. No. 90-284, 801, 82 Stat. 73 (1968). Title VIII forbids discrimination in the sale, rental or financing of housing and the provision of brokerage services. Aggrieved parties are expressly authorized to enforce their rights under the statute in federal district court without regard to the amount in controversy. The statute is not limited to state action or federal grantees.

> license the judge may grant upon petition of the applicant, and upon being satisfied of his skill and fitness, and of his good moral character, and upon payment by the applicant to the clerk of the district court of one hundred dollars if a shopkeeper or peddlar, to be paid annually, and ten dollars if a mechanic, artisan, or to engage in any other trade, also to be paid annually: Provided, however, that upon complaint being made and proved to the district judge of an abuse of such license, he shall revoke the same: And provided, also, that no person of color shall practice any mechanical art or trade unless he shows that he has served an apprenticeship in such trade or art, or is now practicing such trade or art. MCPHERSON at 29-44.

It is important that the statutes and ordinances referred to and excerpted above be seen in their proper context. They are merely illustrative and could not reflect adequately the pervasiveness of the discrimination which permeated every aspect and institution of American society.[14]

[14] Even when the more odious of "Black Codes" were overturned, patterns and practices carried over from slavery and its immediate aftermath continued to persist. When ex-slaves banded together to form the Freedmen's Savings Bank (which had deposits at one time of $57 million), they encountered staunch opposition from Southern state governments and White banks. ". . . the white planter regarded the Freedmen's Saving Bank as part of the Freedmen's Bureau and did everything possible to embarrass it and curtail its growth." W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA at 600 (1st ed. 1935); W. FLEMING, THE FREEDMAN'S SAVING BANK at 1, 26 (1st ed. 1919). Eventually Jay Cooke and Company and the First National Bank of Washington controlled, traduced and looted the bank. Added to the usual problems faced by small businesses (e.g. securing credit, competition from larger, more efficient enterprises, etc.), Blacks had to contend with racial discrimination by big bankers, suppliers and customers. Blacks could expect less police protection of their property and greater insecurity of their property rights in cases brought before the courts. As a successful Black businessman in Atlanta emphasized, "if we can have justice in the courts and fair protection we can learn to compete with white stores and get along alright." HIGGS, at 91-92. This Court has long been cognizant of the impact of the system of justice on economic enterprise. *See generally Goesart* v. *Cleary*, 335 U.S. 464 (1948); *Morey* v. *Doud*, 354 U.S. 457 (1957); *Hadacheck* v. *Los Angeles*, 239 U.S. 394 (1915); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Hence, it should not be surprising that it has been noted that the aforementioned practices significantly aided in the exclusion of Blacks from the marketplace. HIGGS, at 11.

> Blacks did accumulate property, but the actions of white police and law courts attenuated their property rights by refusing to provide them with the equal protection of the laws . . . The Black man could expect a higher risk to surround his investments because the agencies charged with enforcing property rights, the police and the law courts, did not offer him equal protection. For the Black man the future was always more uncertain than for the white man. Hence, to adjust for this greater risk he discounted future returns more heavily. Moreover, if he could expect to encounter effective discrimination in the marketplace, the stream of projected returns would be reduced, or the projected costs increased, or the rate of interest higher, as compared with the levels applicable to a white investor. All these differences worked to reduce the present value of investment by blacks and therefore to discourage them from investing as much as whites other things being the same.

The ability of Blacks to become entrepreneurs was hampered as well by legislation and actions that were designed to maintain them as a permanent underclass of low-paid labor for White employers. White employers who refused to pay their Black workers, White employers who agreed not to hire freed slaves without permission of former masters, and general hostility of White employers directed against Black labor was a frequent source of comment and investigation in Congress and was the back-drop for congressional efforts to bring Blacks into the mainstream. CONG. GLOBE, 39th Congress, 1st Sess. 95, 1160 (1833); Report of Carl Schurz, SENATE EXECUTIVE DOCUMENT No. 2, 39th Cong., 1st Sess. 2, 17-25. In Mississippi, newspapers frequently called for discrimination against Black artisans and laborers. Railroad shops and a foundry established in Water Valley in 1866 abjectly barred Black labor. In 1874, the Vicksburg & Meridian Railroad replaced all its Black mail agents with Whites. V. WHARTON, THE NEGRO IN MISSISSIPPI, 1865-1890, at 127 (1947). Such incidents were not isolated but a piece of a larger pattern and practice affecting the entire Black community. Blacks could not "pull themselves up by their bootstraps" because there were neither straps nor boots.

In the wake of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and the equal protection assault upon state-

imposed segregation, many of the statutes and ordinances which facially restricted the opportunities of people of color disappeared. But as with the abolition of slavery, those customs and institutional practices which were fostered by and critical to nearly a century of state-imposed segregation did not come immediately to an end. To the contrary, they persist to this day.

In a report prepared by the House Sub-Committee on Small Business Administration's Oversight and Minority Business Enterprise, the following statement appears:

> The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular.* H.R. Rep. No. 1791, 94th Cong., 2nd Sess. 182-83 (1976).

The construction industry to which the MBE provision is addressed typifies the problem.[15]

[15] Although discrimination against minority construction firms is difficult to document statistically, a number of studies have confirmed the existence of such discrimination. *See,* e.g. R. Glover, Fostering Minority Enterprise in Construction (April 1975) (Report for the Center for the Study of Human Resources, University of Texas, at Austin, on file at the *Harvard Civil Rights-Civil Liberties Law Review*): S. Taylor, Catching up: A study of Behavior and Experience of Minority Construction Contractors in Nine American Cities (May 1973) (Report for the Charles F. Kettering Foundation, on file at the *Harvard Civil Rights-Civil Liberties Law Review*).

> Historical patterns of racial and economic discrimination, have prevented minority construction contractors from entering the construction industry and from attaining long-run success. Minority firms have difficulty entering the industry because of inadequate financing, insufficient bidding opportunities and lack of access to the business relationships necessary to develop competitive bidding skills. Firms that survive the initial entry period often find that they are unable to obtain the surety bonding necessary to compete for large and profitable construction contracts. . . .
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> Most large public and private construction projects require all of their contractors and subcontractors to obtain surety bonding. Minority firms, because they are often inexperienced and undercapitalized, have difficulty convincing sureties that their business risks are sufficiently low to make bonding worthwhile for the surety. Bonding is also denied because of racial discrimination. . . .
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> All of these factors operate to prevent minority construction firms from participating effectively in public and private construction projects. Comment, *Minority Construction Contractors,* 12 HARV. C.R.-C.L. L. REV. 693 (1977).

C. It Would Be Proper For Congress To Conclude That The Historical Exclusion From The Economic Mainstream Constitutes A Badge And Incident Of Slavery.

In the *Civil Rights Cases of 1883,* Justice Bradley spoke for the entire Court when he declared that, "By its own unaided force and effect [the Thirteenth Amendment] abolished slavery and established universal freedom." 109 U.S. 3, 20 (1883). That propostion, recently reaffirmed by this Court twice in just over a decade, remains a clear and unambiguous expression of the state of the law.[16]

[16] *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Runyon* v. *McClary,* 427 U.S. 160 (1976).

Equally clear, and just as viable today as ever, is Justice Bradley's recognition that the Thirteenth Amendment did more than merely prohibit discriminatory action. Rather,

> . . . [T]he power vested in Congress to enforce the Article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. . . . 109 U.S. at 3, 20 (1883)

This reading of the meaning of Article 2 of the Thirteenth Amendment has yet to be challenged in the scholarly literature or in the cases presented to this Court.

Assuming that the current exclusion of minorities from the economic mainstream, in general, and the construction industry in particular had its genesis in the institution of slavery, it then remains to be determined whether this continuing pattern can be described within the category "badges and incidents" of slavery and thus amenable to legislative remediation. A century of decisions by this Court provides a ready affirmative answer.

In the *Slaughter House Cases*, 83 U.S. 36 (1873), less than a decade after the passage of the Civil War Amendments, Justice Miller stated the fundamental truth.

> . . . We repeat, then, in light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments; no one can fail to be impressed with one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedom and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment in

> terms mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." 83 U.S. at 71-72.

Six years later, the Court reaffirmed this original understanding. In *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), Justice Strong commented on the Fourteenth Amendment.

> This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. 100 U.S. at 306.

The historic debate in the *Civil Rights Cases of 1883* (between Justices Bradley, speaking for the majority, and J. Harlan dissenting), involved the question as to which of the multitude of disabilities suffered by Blacks were to be considered the badges and incidents of slavery and thus amenable to legislation under the Thirteenth Amendment. In Justice Bradley's views, the badges and incidents of slavery were limited to those legal disabilities imposed on slaves "that interfered with their fundamental rights" of citizenship. 109 U.S. at 22. He stated,

> Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the

> essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. *Id.*

By stressing the literal, legal trappings of slavery, Justice Bradley totally ignored the legislative history of the Thirteenth Amendment and the historical reality of the institution of slavery and its institutional aftermath. His narrow interpretation of what constituted a badge and incident of slavery restricted the scope of the Thirteenth Amendment and by implication rejected the Congress' determination as to what were the badges and incidents of slavery.

Justice Harlan, on the other hand, urged a more expansive reading of what were badges and incidents of slavery.

> . . . I hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of [the Thirteenth] amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character. . . . 109 U.S. at 36 (citations omitted)

For Justice Harlan, discrimination based on theories of racial inferiority was a substitute for slavery and as such, clearly a relic of slavery.

It is important to note that while the more expansive view of Justice Harlan has best withstood the test of

time, the facts presented in this particular case, fall well within the narrow parameters outlined by Justice Bradley and subscribed by Justice Stewart in *Jones*.[17] The current exclusion from the economic mainstream is a direct consequence of the denial of "those fundamental rights which are the essence of civil freedom, namely the right to make and enforce contracts . . . and to inherit, purchase, lease, sell and convey property." This exclusion thus becomes a part of those burdens and disabilities which even Justice Bradley would find constitute "the substance and visible form" of slavery.

To date, neither the Court nor the academic community have sought to compile an exhaustive listing of those practices which could be considered "badges and incidents" of slavery. This is a matter committed by the Constitution to the province of the Congress.

> Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of that protection may be such as long as Congress, in the legitimate exercise of its legislative discretion, shall provide, and may be varied to meet the necessities of a particular right. *United States* v. *Reese*, 92 U.S. 214, 217 (1875).

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[17] To the contrary, in *Hodges* v. *United States*, 203 U.S. 1, the Supreme Court held that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery" and asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment. *Contra*, *United States* v. *Cruikshank*, 25 Fed. Cas. 707, 714 (dictum of Mr. Justice Bradley, on circuit), *Aff'd*, 92 U.S. 542 *United States* v. *Morris*, 125 F. 322, 324, 330-331. (E.D. Ark. 1903) In *Jones*, Justice Stewart clearly rejected this interpretation. In footnote 78, he stated, "The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled." 409 U.S. at 442-3.

Justice Stewart agrees, "surely Congress has the power under the Thirteenth Amendment *rationally* to determine what are the badges and the incidents of slavery . . . ." (emphasis added) 392 U.S. at 440 (1968).

No recent court has even suggested that Justice Stewart's impression as to the scope of congressional power is inaccurate. Just as Justice Stewart could not conclude that "the determination Congress has made [was] an irrational one" *Id.* at 440-41 with reference to legislation outlawing private discrimination in the sale of real property, so is it implausible to conclude that Congress acted irrationally by determining that the documented historical exclusion of minorities from the economic mainstream in general, and the construction industry in particular, is a "badge and incident" of slavery amenable to legislative amelioration.

D. The MBE Provision Is Appropriate For Thirteenth Amendment Purposes And Thus Unassailable On Fourteenth Amendment Grounds.

Assuming that Congress rationally determined that the historic exclusion of minorities from the economic mainstream is a "badge and incident" of slavery amendable to legislative remediations, the only remaining question is whether the Congress was empowered to adopt the specific race-conscious provision challenged in the instant case.

This issue is presented to the Court only obliquely since Petitioners proffer a narrow Fourteenth Amendment argument as the basis for their objection to the MBE provision.[18] Petitioners contend that the provision

[18] Petitioners also contend that the "minority business enterprise" provision of the Public Works Employment Act of 1977 fails because it conflicts with Title VI of the Civil Rights Act of 1964. Petitioners virtually ignore the rule of construction which requires the Court to harmonize statutes. Petitioners, like the court in *Associated General Contractors of California* v. *Secretary of Commerce*, 441 F. Supp. 955, 967-68 (C.D. Cal. 1977), merely assume that Title VI and §-103(f)(2) are in conflict.

Contrary to Petitioners' assertion, *Amici* contend that the provisions of these two federal statutes reasonably can and certainly should be read in harmony.

Amici contend that harmony is achieved by examining the intended scope and purposes of these statutes. *Bailey* v. *United States*, 511 F. 2d 540, 546 (1975). Upon such examination, the inescapable conclusion is that Title VI and § 103(f)(2) were *both primarily* designed to remedy various aspects of discrimination against Blacks and other minorities. These common goals, which both enactments foster, provide the bases for their reconciliation and harmony, and do not invalidate the explicit remedial use of race in § 108(f)(2). Furthermore, the effect of both Acts is to help fulfill the unfulfilled promise of the Thirteenth Amendment to eliminate certain badges and incidents of slavery. Thus, implementing the mandates of the Thirteenth Amendment provides a harmonizing principle based squarely in the Constitution.

A majority of the justices in the *Bakke* case found Title VI was primarily designed to end discrimination against minorities. Four justices in the *Bakke* case explicitly found Title VI and § 103(f)(2) in harmony as promoting the same ends.

Speaking in *Bakke*, Mr. Justice Powell opined that

> [Title VI] must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.
>
> The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. . . . Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. *Bakke*, 438 U.S. at 285.

The Opinion of Justices Brennan, White, Marshall, and Blackmun reached a similar conclusion as to the purpose of Title VI.

> The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI

can be sustained only if Respondent can establish that a compelling government interest is achieved by the least onerous means. This argument is without either force or effect in the face of the Thirteenth Amendment.

It cannot be denied that cases of this genre present a facially troublesome dilemma. Nonetheless, the incisive comments of Justice Blackmun provide a perspective from which to view this "dilemma."

> . . . the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where it embraces a broader principle. This enlargement does not mean that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action" in the face of proper

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emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. 438 U.S. at 334.

The opinion of Justices Brennan, White, Marshall, and Blackmun explicitly discusses the relationship between Title VI and § 103(f)(2). In that Opinion, these four Justices find support for their view that race-conscious remedies for societal discrimination are not prohibited by Title VI, in the passage of § 103(f)(2).

As to the purpose of the "set-aside" law, these Justices explicitly found that § 103(f)(2) was

> a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises. It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprices. 123 CONG. REC. 1437 (Rep. Mitchell). 438 U.S. at 348-49.

These Justices found that Congress must have found Title VI and § 103(f)(2) in harmony, since it found it

> inconceivable that . . . a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 438 U.S. at 349.

> facts, is all about. If this conflicts with idealistic equality, *that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed*, and it is part of the Amendment's very nature until complete equality is achieved in the area. (emphasis added) 438 U.S. at 405.

Thus impregnated in the Civil War Amendment from the outset, the tension to which Justice Blackmun avers can be resolved only by resort to the original understanding of the meaning of those amendments—that they sought to establish and to secure a constitutional right to universal freedom.[19] This right to freedom becomes the reconciling principle for the "constitutionally perceived and imposed" tensions. As such it commends that the Amendments adopted to secure universal freedom, the Fourteenth and Fifteenth, be construed in a manner consistent with and supplementary to the Amendment which established the principle of universal freedom by abolishing the institution of slavery. Construed in this manner, the Fourteenth Amendment cannot operate to invalidate any measure undertaken upon the authority of the Thirteenth.

Even assuming that the Court deems it appropriate to consider the nature of the governmental interest, it must be presumed that the mandate of the Thirteenth Amendment is *ipso facto* an expression of governmental interest of sufficient import as to be deemed "compelling" by any standard in any Court at any time.

The exclusion of minorities from the economic mainstream is a matter of public record and has been the subject of such repetitive findings and overwhelming proof as to be a proper subject both for judicial and

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[19] Kinoy, *The Constitutional Rights of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

legislative notice.[20] Nonetheless, Petitioners contend that the question . . . is whether or not Congress has made the requisite detailed findings of constitutional or statutory violations sufficient to constitute the extraordinary

[20] The following is a selected listing of official findings since 1970 concerning the exclusion of minorities from the economic mainstream: H.R. REP. No. 1615, 92d Cong., 1st Sess. (1972); H.R. REP. No. 1626, 92d Cong., 1st Sess. (1972); H.R. REP. No. 468, 94th Cong., 1st Sess. (1975); H.R. REP. No. 1791, 94th Cong., 2d Sess. (1977); H.R. REP. No. 604, 95th Cong., 1st Sess. (1977); H.R. REP. No. 949, 95th Cong., 2d Sess. (1978); H.R. REP. No. 1070, 95th Cong., 2d Sess. (1978); H.R. REP. No. 1714, 95th Cong., 1st Sess. (1978); H.R. REP. No. 1830, 95th Cong., 2d Sess. (1979); S. REP. No. 31, 96th Cong., 2d Sess. (1979); H.R. DOC. No. 69, 92d Cong., 1st Sess. (1971); H.R. DOC. No. 194, 92d Cong., 2d Sess. (1972); Amendments to Small Business Act and Small Business Investment Act of 1958, PUB. L. No. 95-507, 92 Stat. 1757 (1978); Exec. Order No. 11518, 3 C.F.R. 1966 (1970); Exec. Order No. 11625, 3 C.F.R. 1971 (1971); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, BUILDING MINORITY BUSINESS ENTERPRISE (1970); PRESIDENT'S ADVISORY COUNCIL ON MINORITY BUSINESS ENTERPRISE, MINORITY ENTERPRISE AND EXPANDED OWNERSHIP: BLUEPRINT FOR THE 1970's (1971); DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, MINORITY OWNERSHIP OF SMALL BUSINESS: INSTRUCTIONAL HANDBOOK (1972); DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, MINORITY OWNERSHIP OF SMALL BUSINESS: THIRTY CASE STUDIES (1972); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, PROGRESS REPORT: THE MINORITY BUSINESS ENTERPRISE PROGRAM 1972 (1972); COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, LIMITED SUCCESS OF FEDERALLY FINANCED MINORITY BUSINESSES IN THREE CITIES (1973); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, REPORT OF THE TASK FORCE ON EDUCATION AND TRAINING FOR MINORITY BUSINESS ENTERPRISE (1974); U.S. COMMISSION ON CIVIL RIGHTS, DISTRICT OF COLUMBIA ADVISORY COMMITTEE, OBSTACLES TO FINANCING MINORITY ENTERPRISES (1974); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, FEDERAL PROCUREMENT AND CONTRACTING TRAINING MANUAL FOR MINORITY ENTREPRENEURS (1975); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, MINORITY ENTERPRISE PROGRESS REPORT (1976); DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY (1976); PRESIDENT'S INTERAGENCY TASK FORCE ON MINORITY BUSINESS OWNERS, REPORT ON WOMEN BUSINESS OWNERS (1978).

justification required to sustain the racial classification in question. This standard no doubt derives from the language in the opinion of Justice Powell in *Bakke*. 438 U.S. at 307-9. Rather than track Justice Powell's formulation, Petitioners misconstrue, misstate, misapply and attempt to transmogrify the Powell standard into a mandate for the Court to become the arbiter and parliamentarian of the legislative process.

The admittedly scant legislative history on this particular provision in this specific piece of legislation is directly attributable to the fact that the provision being challenged was introduced as an amendment to a bill on the floor of both the House and Senate. The absence of detailed legislative findings is thus a phenomenon inherent in the floor amendment process.

The import of Petitioners' standard would be to have the Court, on its own initiative, deny members of Congress the right to propose, or to consider amendments to bills on the floor of Congress, on the pain that if subsequently passed, the amended legislation may be subjected to greater scrutiny and accorded less weight than legislation which is not amended on the floor. The Court would thus take the anomalous position that an amendment proposed on the floor of Congress, debated by the members there assembled, and voted upon on its own merits separate and apart from the rest of a proposed bill, is somehow less legitimate an outcome of the democratic process and the will of Congress than a similar provision buried in a committee report and passed in a larger bill.

This is a position inconsistent with common sense, constitutional democracy and the historic role of this Court.

Consistent with their narrow Fourteenth Amendment analysis, Petitioners urge the Court to adopt the restrictive "least onerous means test" generally applied as the

second-tier of the "strict scrutiny" regime. That test has never been applied in a Thirteenth Amendment context and is inappropriate to the instant case.

The proponent of the race-conscious measure being challenged in this case is not a state university or private employer. The proponent is the Congress of the United States—an equal and coordinate branch of government. Moreover, in passing this measure, Congress was acting in an area expressly committed to it by the Constitution and pursuant to an explicit grant of constitutional power.

Not one of the cases construing the Thirteenth Amendment even hint that the Court intends to so constrain congressional power in the manner demanded by Petitioners.

Moreover, there is some support for a general proposition that this Court will not apply the "least onerous means" test to legislation when Congress acts pursuant to express constitutional authority. A clear example of this can be seen in the treatment afforded one of the groups included within the MBE provision which is challenged in the instant case—Native Americans. The Constitution gives Congress exclusive authority to regulate commerce with Indian tribes. U.S. CONST. art. I, § 8. Consequently, the Court has held consistently that the rational basis test is appropriate even where special or preferential treatment is accorded to Indians.

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480 (1976); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977).

Justice Stewart's treatment of this issue in *Jones* is instructive. He recounted how Representative Wilson of

Iowa, the floor manager for the Civil Rights Act of 1866, urged that Congress had ample authority to pass the then pending bill, by recalling the admonition of Chief Justice Marshall in *McCulloch* v. *Maryland*,

> Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution are constitutional. 17 U.S. 316, 421 (1819).

Justice Stewart continued

> "The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the maintenance of freedom. . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality." We agree. 392 U.S. 409, 443-44 (1968).

No clearer statement is possible and none is needed.

CONCLUSION

At the outset of his dissent in *Weber*, Chief Justice Burger made this statement.

> The Court reaches a result I would be inclined to vote for were I a member of Congress considering a proposed amendment to Title VII. 99 Sup. Ct. at 2734.

Even more explicit was the observation by the Chief Justice.

> Until today, I had thought the Court was of the unanimous view that "discriminating preference for any group . . . is precisely and only what Congress has proscribed." *Had Congress intended otherwise, it very easily could have drafted language allowing what the Court permits today.* (emphasis added) *Id.* at 2735.

The Chief Justice therefore would admit no constitutional infirmity to congressional action which would expressly authorize an employer to set-aside a specified number of positions for minority employees even if that process entailed passing over white employees with more seniority. The Chief Justice dissented in *Weber* because he objected to the majority's "rewriting of a crucial part of Title VII to reach a desirable result." *Id.*

Unlike *Weber*, the instant case calls upon the Court to give effect to a clear expression of congressional intent—not to discern it. It is the letter not the spirit of the law, which is at issue here. The Congress has acted and it remains to be seen whether this Court is willing to be accused justly of once again having ". . . strangled Congress' effort to use its power to promote racial equality."

Not to uphold the judgment of the Court of Appeals would mean that this Court chose to accept an invitation to step back into the nineteenth century. In that event,

Justice Marshall's poignant lament would be transmogrified into prophecy.

"I fear we have come full circle." 438 U.S. at 402.

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AMICI STATEMENTS OF INTEREST

The *Affirmative Action Coordinating Center* (*AACC*) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other groups have joined as *amici* in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber* and *Bakke* cases.

AACC publishes an informational newsletter entitled *AACC News*. It has installed a national telephone "hotline" to receive and dispense information on affirmative action developments. It is preparing several educational publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has been a leader in the battle against the growing concept of "reverse discrimination." NCBL strongly believes that the adoption of

the principle of reverse discrimination by the courts and the continued attacks on affirmative action plans, as in *Bakke*, *Weber* and *Fullilove*, represent a rejection of the nation's professed commitment to equality of opportunity. Without the power of Congress to enact legislation to eliminate the effects of 400 years of institutional discrimination, the goal of racial equality will continue to be a commitment with form but no substance.

The *National Lawyers Guild* was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to co-sponsor a *Bakke amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The *Affirmative Action Committee of New Haven* is composed of members of municipal and community based organizations that are concerned with affirmative action issues. The committee supports the principle of the Mitchell Amendment and is seriously concerned about the future of minority enterprise.

The *Afro-American Museum and Research Center* of Youngstown, Ohio is a national information center and clearinghouse of materials of importance to Afro-Americans. As an organization intimately involved with preservation and cultivation of Black history, we are well aware of the badges of slavery that continue to bar Blacks from the economic mainstream.

The *Asian Law Caucus* provides legal assistance in the areas of employment and housing and engages in community education and impact litigation on behalf of the Asian communities of the San Francisco Bay Area. The difficult and often tortured Asian-American historical experience convinces us that affirmative action programs must be supported and expanded.

Asian Legal Services Outreach provides legal service and education to the Sacramento area Asian communities. We recognize that underlying discrimination against minorities must be attacked via affirmative action.

Asociación Politica de Habla/Apellido Español (Spanish Speaking/Surnamed Political Association) was the first organization to file suit demanding the right to vote in Spanish and contesting discrimination against non-English speaking persons reflected in the Voting Rights Act of 1965; this led ultimately to amendment of same. Our experience in pushing for the rights of the Spanish speaking convinces us of the crucial need for affirmative action.

Associated Minority Contractors of America is a national trade association whose concern is representing the interest of minority construction contractors. We are presently constituted in forty states and the Virgin Islands. We are well aware of the discrimination suffered—past and present—by minority contractors and recognize that set-asides are a prime method for alleviating this persistent problem.

Associated Transit Guild is a fraternal organization of Black employees within the New York City Transit Authority. As workers in the most important industry in the most important city in this country, we know that minority workers are not hired unless minority contractors get contracts.

Association of Community Organizations for Reform Now (ACORN), which is constituted in thirty states, organizes low income families and neighborhoods around crucial economic and political concerns. We recognize that set-asides for minority contractors introduces a significant elemenf of competition into an otherwise monopoly-dominated industry, thus lowering prices for the ultimate consumers.

Barristers Association of Philadelphia consists of over 400 Black attorneys. Our interest in this case stems from our belief that the effect of cases such as *Fullilove* is to undermine the legitimacy of affirmative action programs; this affects us adversely and, as well, the constituency we are pledged to serve.

Black American Law Students Association (BALSA) is the representative organization of Black law students in this country. We recognize that the severe dearth of the Black law student and law faculty could possibly plummet even more if affirmative action receives a set back in *Fullilove.*

The Black Panther Party was founded in 1966. Despite numerous obstacles thrown in its path, it has worked consistently for concrete political, social and economic change. The BPP sees the advancement of affirmative action as essential for said change.

Black Methodists for Church Renewal, Inc. is the official Black Caucus within the United Methodist Church. We are a national organization with a chapter in each of the five geographic jurisdictions and sub-caucus groups in

several states and municipalities. We see affirmative action as simply a reflection of Christian concern for equality of all peoples.

The *Civil Rights—Civil Liberties Research Committee of Harvard Law School* is a student organization which provides civil rights lawyers with research, briefs and memoranda. We have contributed to major litigation efforts e.g. the *Spock* conspiracy trial and appeal, *Gideon* v. *Wainwright, etc.* Our massive research in the area of affirmative action has convinced us that it is not only legal and constitutional but absolutely mandatory if equality is to ever become a reality.

The *Champaign-Urbana Tenant Union* has supported the affirmative action ordinances of the cities of Champaign and Urbana, Illinois. Our experience here has shown that these ordinances, which apply to vendors, contractors, etc. doing business with the cities, benefit not only minority communities but all people. Hence, we support the upholding of the *Fullilove* ruling.

The *Cleveland Tenants Union* unequivocally supports set-asides for minority contractors. Our firm position is that affirmative action is in the best interests of the entire community.

The *Council on Interracial Books for Children* recognizes the damaging effect that persistent inequality has, not only on the victims of such practices, but on the majority as well. Hence, we support set-asides and affirmative action generally because it is designed to root out such deleterious practices.

The *Emergency Land Fund,* is dedicated to preserving the ownership of real property by Blacks which has been diminishing steadily. We see support for minority contractors to be consistent with our effort and hence, support the Mitchell Amendment.

The *Fair Housing Council of Orange County* is a non-profit California corporation organized for the purpose of promoting fair housing laws and eliminating housing discrimination. We support set-asides for minority contractors and view such regulations as a benefit for the entire community.

The *Food Research and Action Committee* is a national, non-profit law firm and advocacy organization working to end hunger and malnutrition in the United States. We join this brief because we see hunger as an outgrowth of poverty and poverty as an outgrowth of lack of access to employment, training and the economic mainstream. We see set-asides as a means of improving the economic well-being of minorities—who are disproportionately affected by hunger and poverty—and thus, wholeheartedly support affirmative action.

The *Grand Jury Project*, is organized to end abuse of the grand jury system. We are cognizant of the fact that the grand jury often focuses disproportionately on third world communities and we see attacks on affirmative action as consistent with that effort. Hence, we join *amici* in this brief.

The *Greater New Haven Business and Professional Association* consists of affiliate firms and professionals. We have assisted over 2000 minority construction contractors, architects and engineers. Consequently, we are well aware of the past and present discriminatory practices visited upon minority contractors by white contractors, suppliers and financiers. We have intimate knowledge of the quota system which resulted in 100% of contracts going to whites and 0% to Blacks. We are also aware of business quotas set by Congress that have gone unchallenged in the steel, oil, cattle and automotive industries, among others. We, therefore, join enthusiastically with *amici*.

Hartford Neighborhood Legal Services views the setting aside of a fixed percentage of governmental construction contracts for minorities as an effective way to begin to eliminate the effects of institutional discrimination. We also believe that the court should defer to Congress in its implementation of the 13th and 14th Amendments in light of such cases as *Katzenbach* v. *Morgan* and *Jones* v. *Mayer*.

The *Institute of the Black World* conducts major research on the political social and economic situation of Blacks in this country. As a result, we are convinced that affirmative action programs are not only necessary but mandatory, if the stain of inequality is to be removed from this nation's escutcheon.

The *Interracial Council for Business Opportunity* is the largest national minority business development organization in the country. Co-chaired by noted Black economist Arthur Brimmer, ICBO maintains councils across the country in eight geographic areas and has served as a contract agency for the Office of Minority Business Enterprise (OMBE). ICBO urges the Court to uphold the Mitchell Amendment as a major step toward equity for minority business.

The *Interreligious Foundation For Community Organization, Inc.* (IFCO) is a non-profit foundation established to strengthen empowerment efforts of grass roots organizations. Our 37 member board represents a broad cross-section of religious, educational and community organizations. We urge the court to uphold the Mitchell Amendment and view continued expansion of affirmative action as essential for the future of this country.

Impact Associates of Philadelphia is a multi-racial organization of men and women whose goal is to develop in the minority community an independent political power base. We see economic advancement as crucial for the

attainment of this goal and, thus, urge this Court to uphold the Mitchell Amendment.

The Law Students Civil Rights Research Council since its inception in 1968 has assisted the efforts of every major civil rights, civil liberties and public interest organization Our work and research has convinced us that support and expansion of affirmative action must continue.

Liberation News Service provides weekly packets of news and graphic materials to newspapers, radio stations, libraries, etc. Our daily and extensive coverage of third world communities convinces us that affirmative action should be expanded not stopped. Hence, we join in cosigning this brief.

The Metropolitan New York Council of Minority Builders, Inc., is a voluntary, non-profit association incorporated under New York laws. This organization was created to address the special concerns of minority contractors by shaping public opinion on critical issues and drafting or supporting legislation to cure the problems which have drastically curtailed minority participation in the construction industry. The Council's membership consists of minority contractor associations representing six counties including Westchester, the Bronx, Queens, Kings (Brooklyn), Nassau and Suffolk. The Council contends that the economic viability of minority contractors is closely linked, through the construction industry, to the economic stability of minority communities. Therefore, the Council's principal goal is to build viable construction businesses which the organization believes can eventually aid in bringing economic parity to minority communities.

As an association comprised of minority contractors, the Council's membership represents a pool of potential beneficiaries under the Public Works Employment Act

and particularly that section of the law which mandates at least ten percent of each grant awarded be reserved for minority business enterprises.

The Minority People's Council of the Tennessee-Tombigbee Waterway is a coalition of over 4,000 individuals and organizations in the Southwest and Northeast Mississippi area of this major federal public works project. Our first-hand knowledge of the workings of the Public Works Act convinces us that set-asides for minority contractors has a decidedly beneficial impact for the entire community. Of the $400 milllion contracted to construction firms for this major project (one of the largest in U.S. history) in our area, minority firms have received less than $2 million. Thus, enactments like the Mitchell Amendment are absolutely necessary and we urge the Court to uphold this legislation.

The National Alliance Against Racist and Political Repression is a broad coalition of church, labor, student and civic groups formed in 1973 to fight repression. The NAARPR appears here because of its deep and demonstrated concern for the future necessity and expansion of affirmative action.

The National Black United Fund is a non-profit, tax-exempt organization founded to increase the amount of charitable contributions for groups serving the Black community. Our day to day experience has shown us conclusively that affirmative action must be supported and expanded.

The National Child Labor Committee was chartered by Congress 75 years ago to promote child labor legislation. Presently, we are involved in numerous projects including studies of people in the workplace. Our thorough and meticulous investigation has revealed that minority children—for obvious economic reasons—are disproportionately represented in the ranks of child

laborers. Thus, we have a special interest in urging the Court to uphold affirmative action as a path to equality.

The *National Employment Law Project* is a legal services organization which provides assistance in all areas of employment law. We have been involved in the creation of numerous affirmative action programs adopted voluntarily and involuntarily by public and private agencies that use racial classifications to remedy racial discrimination. If the Mitchell Amendment is not upheld, severe detriment to many of our minority clients would result.

The National Indian Youth Council (NIYC) was formed in 1961 to protect and enrich the Indian tribal community. Our large membership has strong ties to many different Indian communities on and off the reservation. Our fight for Indian preference in hiring in the Bureau of Indian Affairs has convinced us of the need for continued affirmative action.

Opportunities Industrialization Centers of America, Inc. (OIC) is a national orgaization based in over 140 communities. Founded by Rev. Leon Sullivan, OIC has long been concerned with the economic well-being of the unskilled and disadvantaged. Our extensive contacts in the mountains of Appalacia, in the inner cities, in the barrios, in the rural South, and in depressed communities throughout the United States convinces us of the dire need for extensive affirmative action.

Panamerican/Panafrican Association is a ten year old foundation devoted to Intra/Inter-African American education, cultural and economic exchange. We support the Mitchell Amendment in light of the virtually insurmountable systemic barriers to minority business in the private sector and acknowledge that Congress has the right to legislate a remedy to the socio-economic aspects of this dilemma.

Prisoners Rights Organized Defense (PROD) is affiliated with the American Civil Liberties Union (ACLU) and is concerned with prison rights and conditions of confinement for inmates in New Jersey. The overrepresentation of minorities in prisons has a direct correlation with their under-representation in the mainstream of economic life. Hence, we join with *Amici* in beseeching the Court to uphold the Mitchell Amendment.

Schenectady Community Action Program is an official anti-poverty agency. We are aware of the disproportionate number of Black and other minority families living in poverty. We believe that increasing business opportunities for minority firms will result in more job opportunities for minority persons; hence, we join with *Amici* in this brief.

Southern Christian Leadership Conference (SCLC) was founded by Nobel Laureate Dr. Martin Luther King, Jr. in 1957. It has 200 chapters and affiliates across the country and, historically, has had a strong base in the Black church—the most durable and important institution in the Black community. Our knowledge and experience convinces us that advancement of affirmative action is essential for both the economic and moral well-being of this nation. If minority workers are to receive jobs, minority contractors must receive contracts.

The Southern Organizing Committee for Economic and Social Justice believes that affirmative action is the only way that minorities and women in this country can begin to achieve social justice—and also because it is in the best interests of white working people as well. This is because, *inter alia*, only as there are strong united movements of Blacks and Whites, will working people advance. Such unity depends on fair and honest relationships which affirmative action brings.

The Southern Poverty Law Center is a private nonprofit foundation dedicated to securing and enforcing the

rights of the poor. Our experience in this area has demonstrated to us the dire necessity for affirmative action.

The Southern Regional Council is an organization designed to promote equal opportunity among all peoples of the South. Our research studies, which have received wide publicity, detail the need for affirmative action in all sectors of U.S. life, e.g. the judiciary itself. We urge the Supreme Court to give equality a boost by upholding the Mitchell Amendment.

The Suburban Action Institute is a non-profit institute for research and action in the suburbs. Our experience with the frequently exclusionary practices of suburban America has convinced us of its detrimental impact and the need for affirmative action as an antidote.

Try US: National Minority Business Campaign is a national nonprofit organization committed to increasing the sales of minority-owned companies by encouraging purchasing agents of major corporations to buy from minority controlled companies. Working daily in this area has brought home to us the conviction that contracting with minority owned companies has positive economic and social results for the entire community. We urge upholding of the Mitchell Amendment.

The Urban League of Greater New Haven is an affiliate of the National Urban League (NUL). We are intimately involved in promoting Black economic development and affirmative action. We join *Amici* in their effort to uphold the Mitchell Amendment.

The Center for Urban Law, Wayne County Neighborhood Legal Services represents persons in the Detroit metropolitan area. Its clientele is composed primarily of an ethnic population victimized by societal discrimination and institutional racism.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,
Petitioners,

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, *et al.*,
Respondents.

BRIEF AMICI CURIAE OF AMERICAN SAVINGS & LOAN LEAGUE, INC. AND NATIONAL ASSOCIATION OF BLACK MANUFACTURERS, INC. IN SUPPORT OF RESPONDENTS JUANITA KREPS, ET AL.

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October 9, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, *et al.*,
Petitioners,

v.

JUANITA KREPS, Secretary of Commerce of the United States of America, *et al.*,
Respondents.

BRIEF AMICI CURIAE OF AMERICAN SAVINGS & LOAN LEAGUE, INC. AND NATIONAL ASSOCIATION OF BLACK MANUFACTURERS, INC. IN SUPPORT OF RESPONDENTS JUANITA KREPS, ET AL.

INTEREST OF AMICI

The American Savings & Loan League, Inc. (hereinafter "ASLL") and the National Association of Black Manufacturers, Inc. (hereinafter "NABM"), pursuant to Supreme Court Rule 42, respectfully submit this brief amici curiae. Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court.

ASLL and NABM are minority trade associations whose growth and development parallel—and depend upon —the growth and development of American minority busi-

ness enterprise. The ASLL, a non-profit corporation organized under the laws of the District of Columbia, was founded in 1948 as a national organization of black-owned savings and loan associations. It grew slowly until 1968, when it was reorganized and received a technical assistance grant from the Department of Commerce's Economic Development Administration (hereinafter "EDA"). Today, the ASLL is supported by the dues of its nearly four score members (owned and controlled by Hispanic and Asian Americans as well as Blacks) and by the Department of Commerce's Office of Minority Business Enterprise (hereinafter "OMBE"). With this support it offers training, technical assistance, and educational programs to existing minority-owned savings and loan associations and to groups interested in forming new associations.

The NABM, founded in 1971, has a membership comprised of over 800 black-owned businesses. A non-profit corporation organized under the laws of Delaware, the NABM actively lobbies on behalf of legislation of interest to minority businessmen; it was one of the initial supporters of the statute at issue here. The association also publishes a quarterly journal, *Voice of Minority Industry*, and two bi-monthly periodicals—*NABM News* and *NABM Legislative Review*. Like the ASLL, it provides technical support to minority entrepreneurs, works to develop joint venture opportunities involving minority manufacturers and large industrial firms, and collects and disseminates business data from a variety of government and private sector sources.

The NABM and the ASLL are vitally interested in the principle established by Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. I 1977) (hereinafter "the Set-Aside" or "the Set-Aside Amendment"). The problem attacked by that provision—racial discrimination against minority business enterprises—is one with which their members are

intimately acquainted and from which they continue to suffer. The Set-Aside Amendment, in the view of the NABM and the ASLL, attacks this problem in a constructive and effective way: it promotes the business opportunities of minority enterprises so that they can establish themselves in the mainstream of American economic life.

Minorities comprised nearly 16% of the nation's population in 1970. Yet only 3% of the businesses in the United States are minority-owned, and these businesses generate less than 1% of the gross business receipts realized by all American firms.[1] Indeed, there are no minority-owned businesses in the "Fortune 500", and only two black-owned firms in the United States—Motown Industries and the Johnson Publishing Co., Inc. (publishers of *Ebony* and *Jet* magazines)—are of sufficient size to be known to a substantial portion of the general public. The number of minority-owned firms that have "gone national" is insignificant—of the 100 largest black-owned companies in 1978, forty percent were car dealerships, and many of the rest were local service organizations of one type or another. *See The Nation's Leading Black Businesses*, Black Enterprise, June 1979, at 140-159.

The figures in the construction industry, the economic sector most directly affected by the Set-Aside Amendment, are no better. As the Department of Commerce noted in a recent report:

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[1] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 124 (1977). This gross underrepresentation is evident in all sectors of the economy. Federally insured minority-owned savings and loan associations, for example, had total assets of only about $1.5 billion as of mid-1979, less than three-tenths of one percent of the total assets of $556 billion of all of the nation's federally insured savings and loan associations. *Compare* Minority Association Development Division, Federal Home Loan Bank Board, Minority S&Ls Listed According to Assets (1979) *with* News Release of the Federal Savings and Loan Insurance Corporation, at Table 3 (Sept. 28, 1979).

"The purpose of [the Set-Aside] requirement, which was introduced by Congressman Parren Mitchell of Maryland, was to help eliminate discrimination in construction and related industries and to bring minority firms into the mainstream of those industries. The extent to which minority firms have been excluded from these industries in the past is illustrated by data from the 1972 Census of Construction Industries and the 1972 Survey of Minority-Owned Businesses. These reports reveal that minorities owned only 4.3 percent of the construction firms in operation in 1972. Furthermore, minorities received only one percent of the $164.5 billion earned by all construction firms in 1972. The figures are similar with respect to those industries that provide supplies and equipment for construction firms. Minority firms represented only 1.9 percent of the total number of establishments in the wholesale trade industry in 1972 and received only 0.3 percent of the gross receipts. Minority firms' participation in Federal construction procurement in 1977 was also disproportionately low, with such enterprises performing only 1.2 percent of Federal contracts. In addition, minority and female-owned firms received less than seven-tenths of one percent of all contracting dollars spent by those state and local governments that responded to a 1973 U.S. Civil Rights Commission survey." [2]

[2] EDA, U.S. Dep't of Commerce, Local Public Works Program Interim Report: Fostering the Development and Expansion of Minority Firms in Construction and Related Industries, at 1 (Sept. 1978) [hereinafter cited as "Interim Report"].

Petitioners attempt to refute what they term a "statistical shell game" by pointing out that the gross receipts of minority owned construction firms with paid employees increased by 55% in three years, while those of all construction firms grew only 60% in five years, during the late 1960's and early 1970's. Brief for Petitioners at 17-21. The years chosen are not comparable, however, because of the cyclical nature of the construction industry. The value of all construction, for example, increased by over 40% between 1970 and 1973, but by only 10% between 1973 and 1976. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 778 (99th ed. 1978). Similarly, petitioners cite an 85% gain in minority-owned construction business receipts between 1969 and 1972, but do not give comparable figures for that period (during the last two years of which the construction industry as a whole enjoyed unprecedented prosperity) for non-minority firms. Moreover, petitioners fail to note that, because of the small base of minority firms in the construction industry, figures on the growth of those firms are inherently unreliable and subject to wide fluctuations.

Few but petitioners would seriously dispute that racial and ethnic discrimination lie behind the virtual non-participation of minorities in American enterprise that is reflected in the figures presented above. The House Select Committee on Small Business concluded in 1972 that "the minority businessman does not play a significant role in our economy" due to major problems which, though "economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H.R. Rep. No. 1615, 92d Cong., 2d Sess. 3 (1972). The Committee repeated that finding in 1975, and again in 1977 prior to enactment of the Set-Aside:

> "[T]he testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated, to any measurable extent, in our total business system generally, or in the construction industry, in particular."

H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977); *see* H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975).

The executive branch has reached similar conclusions. In 1970 the President observed that "members of minority groups traditionally have aspired to own their own busi-

nesses," but that "through no fault of their own [they] have been denied the full opportunity to achieve their aspirations." Executive Order No. 11,518, 3 C.F.R. 109 (1970). He repeated these sentiments in 1971,[3] the same year that his Advisory Council on Minority Business Enterprise concluded, after an extensive study of minority businesses, that "[e]normous economic inequities, the product of centuries of disregard, discrimination, and institutional racism, still exist. . . ." Minority Enterprise and Expanded Ownership: Blueprint for the 70s, at 5 (1971). Meanwhile, OMBE found no fewer than *five* times between 1970 and 1977 that racial discrimination lies at the root of minority non-participation in the economy. The OMBE Task Force on Education and Training for Minority Business Enterprise concluded in 1974, for example, that "[d]ecades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system." OMBE, U.S. Dep't of Commerce, Report of the Task Force on Education and Training for Minority Business Enterprise 17 (1974). A subsequent OMBE report traced "the severe shortage of potential minority entrepreneurs with general business skills" to their "historic exclusion from various sectors of our economy." OMBE, U.S. Dep't of Commerce, Federal Procurement and Contracting Training Manual for Minority Entrepreneurs 38-39 (1975).[4]

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[3] President's Message to Congress on Expansion of Minority Enterprise Program, H.R. Doc. No. 169, 92d Cong., 1st Sess. 4 (1971).

[4] *See also* OMBE, U.S. Dep't of Commerce, Building Minority Enterprise 2 (1970); OMBE, U.S. Dep't of Commerce, Progress Report: The Minority Business Enterprise Program 1972, at 3 (1972); OMBE, U.S. Dep't of Commerce, Minority Enterprise Progress Report (1976) (forward by Secretary of Commerce Elliott Richardson).

Amici seek to participate in this case for three reasons. First, Amici believe that minority-owned business enterprises (hereinafter "MBEs") represent promising vehicles through which minorities can achieve economic self-sufficiency and overcome the effects of past discrimination. MBEs further this goal by affording minorities the opportunity to establish an economic foothold that is not otherwise readily available. The growth and development of successful MBEs will provide role models and training for minority youth and will assure that minority individuals are placed in meaningful decision-making positions and are given the opportunity to acquire the basic entrepreneurial skills needed to attain economic self-sufficiency.

Second, Amici recognize from the personal experience of their members the need for the remedial measures that have been taken by Congress to assist MBEs. When Congress was considering the Set-Aside Amendment, the promise of MBEs was just that—a promise. Despite talk of affirmative action, efforts to create economic opportunity for minorities had repeatedly fallen far short of their goals, as evidenced by the statistics cited above. By contrast, the Set-Aside produced tangible and substantial results, increasing federally funded MBE contracts by over $500 million in 1977-78. Interim Report at 13.

Third, Amici believe that Congress acted wisely in applying the Set-Aside concept first to the construction industry. That industry was severely depressed at the time the legislation was enacted, and its long history of discrimination made it a prime candidate for congressional efforts to foster MBE growth and development.

STATEMENT OF THE CASE

On July 26, 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (hereinafter "LPWA"), appropriating $2 billion for grants to state and local gov-

ernments to fund public work projects that would generate employment in the economically depressed construction industry. Less than a year later Congress amended the LPWA by enacting the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (hereinafter "PWEA"). That Act appropriated an additional $4 billion for similar projects (known as Round II) and imposed the ten percent MBE Set-Aside requirement at issue here, but applied the Set-Aside to the 1977 appropriation only. The Set-Aside Amendment was added to the PWEA on the floor of the House of Representatives by Representative Parren Mitchell (D.Md.), 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977). It was approved after slight modification and eventually enacted as Section 103(f)(2) of the PWEA, 42 U.S.C. § 6705(f)(2) (Supp. I 1977). That section provides:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Chapter for any public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percentum of which is owned by minority group members . . . For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The reservation of discretionary authority in the Secretary of Commerce was included, as the floor debate in the House makes clear, to allow the Secretary to grant waivers if it appears that meeting the set-aside requirements would pose practical difficulties in any local area. *See* 123 Cong. Rec. H1437-40 (daily ed. Feb. 24, 1977). Implementing regulations permit the Assistant Secretary of Commerce to waive the Set-Aside requirement if he determines that it "cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." 13 C.F.R. § 317.19(b)(2) (1978).[5]

The funds made available under the PWEA were distributed to state and local applicants by the EDA. In August of 1977, EDA issued *Guidelines for 10 Percent Minority Business Participation in Local Public Works Grants. See* Interim Report, Appendix A. These guidelines provide a number of ways in which the MBE requirement can be met, depending upon whether a particular project was administered through a single prime contract involving subcontracts and/or substantial supply contracts, more than one prime contract, simple contracts, or a combination of prime and simple contracts. Grantees are given considerable latitude in selecting the means by which they will satisfy the Set-Aside requirement in any particular project.

Petitioners filed this action on November 30, 1977, seeking declaratory and injunctive relief. On December 19, 1977, the district court issued an opinion upholding the constitutionality of the Set-Aside and dismissing the complaint. *Fullilove* v. *Kreps*, 443 F. Supp. 253 (S.D. N.Y. 1977). That decision was affirmed by the United States Court of Appeals for the Second Circuit on September 22, 1978. *Fullilove* v. *Kreps*, 584 F.2d 600 (2d Cir. 1978). A petition for writ of certiorari was filed with this Court on December 21, 1978, and granted on May 21, 1979. 99 S. Ct. 2403.

SUMMARY OF ARGUMENT

Congress enacted the Set-Aside Amendment in order to remedy the effects of discrimination against minority business enterprises. In doing so, it acted under the broad powers conferred on it by the thirteenth and four-

[5] Through September 5, 1978, the Commerce Department had granted 589 partial or complete waivers under these provisions. Interim Report at 18.

teenth amendments to the Constitution, under which Congress is entitled to choose the remedies it feels are most appropriate, subject to limited judicial review. If Congress' finding of past racial discrimination was rationally based, and if the means selected to remedy that evil were appropriate, its actions must be sustained. The strict scrutiny standard suggested by petitioners, based on their reading of such cases as *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), is inappropriate in such circumstances. Even if strict scrutiny is required of race-conscious acts of local government bodies, and perhaps of Congressional actions *not* based on the thirteenth or fourteenth amendments, statutes such as the Set-Aside Amendment deserve greater deference. Congress, not the courts, has been given the primary responsibility for deciding when and whether the federal government should utilize particular methods of remedying past discrimination.

The Constitution does not require Congress to conduct hearings, develop a detailed record, or make formal findings when it enacts a law. Petitioners' assertion that the constitutionality of a federal statute turns on the volume and specificity of its legislative history is contrary to settled law, at odds with accepted principles of separation of powers, and inconsistent with important public policies.

The record before Congress, viewed in its totality, clearly establishes that Congress enacted the Set-Aside to remedy the effects of past discrimination. The pervasive manner in which this past discrimination has thwarted the growth and development of minority business enterprise was fully documented not only in the legislative history of the Set-Aside provision, but also in the hearings and debate that preceded fifteen years of comprehensive civil rights legislation. Numerous studies and reports by various portions of the executive branch, and the decisions of this and other federal courts, provide additional support for the legislation.

The Set-Aside provision also satisfies the stricter standard of review suggested by Mr. Justice Brennan in *Bakke*, because it serves an important and articulated governmental objective, is substantially related to the achievement of that objective, and does not stigmatize or penalize any minority group. Even if the strict scrutiny standard of review is applied, the Set-Aside passes constitutional muster because it is a "less drastic" or "least onerous" means of satisfying the Government's compelling interest in remedying past racial discrimination.

The Set-Aside Amendment is fully compatible with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), because Title VI was not intended to foreclose race-conscious Congressional efforts to eliminate conspicious racial imbalance attributable to the effects of past discrimination. Even if the two statutes were deemed inconsistent, the Set-Aside—a later, more specific enactment—should prevail as an exception to or qualification of Title VI.

ARGUMENT

I. THE SET-ASIDE PROVISION DOES NOT VIOLATE THE FIFTH AMENDMENT.

The petitioners argue that the Set-Aside Amendment must be found unconstitutional (a) because it is not a "least onerous" or "less drastic" means of serving a compelling governmental interest, and (b) because its enactment was neither accompanied nor preceded by "detailed" congressional findings and thus cannot be shown to advance a compelling government interest.[6] These arguments fundamentally misconstrue this Court's role in reviewing the decisions of a co-equal branch of the Fed-

[6] Brief for Petitioners at 14-17, 21-28; Brief for Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated General Contractors of America, Inc. at 11-31 [hereinafter cited as "Brief for Petitioner, General Building Contractors of New York State"].

eral government. Neither the suggested standard of review nor the presence of formal findings is constitutionally mandated.

A. The Set-Aside Amendment Should Be Upheld Because it Constitutes a "Necessary and Proper" and "Appropriate" Exercise of Congress' Constitutional Power to Remedy the Effects of Past Discrimination.

In enacting the Set-Aside Amendment, Congress utilized the constitutional powers conferred on it by the enforcement sections of the thirteenth and fourteenth amendments to the Constitution. These provisions grant Congress broad, discretionary power to remedy the effects of past discrimination by "appropriate" legislation. Its actions therefore carry with them a powerful presumption of validity. As long as Congress found the Set-Aside provision to be an appropriate remedy for past discrimination against minority businessmen, which it did, and there is a rational basis for that decision, which there was, its actions must be sustained. The "strict scrutiny" standard of review, enunciated by this Court in quite different contexts, should not be applied.

Like all federally financed programs, the PWEA is an exercise of Congress' power to spend federal funds to "provide for the . . . general welfare of the United States." U.S. Const., art. I, § 8, cl. 1. This Court traditionally has been reluctant to interfere with Congressional action taken under this express grant of constitutional authority.[7] Perhaps more importantly, the Set-

[7] *Mathews* v. *De Castro*, 429 U.S. 181, 185 (1976) ("Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the Courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' ") (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937)); *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976) ("[The general welfare clause] is a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. . . . It is for Congress to decide which expenditures will promote the general welfare . . . . Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the general welfare . . . .") (citations omitted).

Aside Amendment is an exercise of Congress' authority under section 2 of the thirteenth amendment to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,"[8] and section 5 of the fourteenth amendment, which authorizes the use of federal funds to undo the effects of unconstitutional discrimination.[9]

Under all of these provisions, Congress' action is entitled to considerable deference—indeed, a substantial presumption of validity—from this Court. The Court has repeatedly observed that the Civil War Amendments' express grants of authority to Congress to "enforce" their provisions through "appropriate legislation" mean that Congress has "full remedial powers" and is "chiefly responsible for implementing the rights created by [the Amendments]." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966).[10]

If Congress' enforcement powers under the Civil War Amendments are to be, as described by the Court in

[8] *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968).

[9] *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 581 (1974) (White, J. concurring); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F.Supp. 338, 349-351 (D.R.I. 1978); *cf. Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (" 'Simple justice requires that public funds, to which taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.' ") (quoting Senator Humphrey's quotation of President Kennedy during the floor debates on the Civil Rights Act of 1964).

[10] *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 441-43; *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-650 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112, 127 (1970).

Oregon v. *Mitchell*, "broad," then judicial review of the exercise of those powers must be correspondingly narrow. This Court has so held:

> "The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
>
> > 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.
>
> "The Court has subsequently echoed his language in describing each of the Civil War Amendments:
>
> > 'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power.' *Ex parte Virginia*, 100 U.S., at 345-346."[11]

In adopting the broad "necessary and proper" standard of review of congressional action designed to implement

[11] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-327 (1966). *See also Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (fourteenth amendment) ("It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.") *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 440-41 (thirteenth amendment); *Adikes* v. *S. H. Kress & Co.*, 398 U.S. 144, 209 (1970); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 157 (1977).

the Civil War Amendments, the Court was applying (in a slightly different context) the standard it had announced when reviewing civil rights legislation enacted under the Commerce Clause. U.S. Const., art. I, § 8, cl. 3. Thus, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), the Court noted that the commerce power "is a specific and plenary one authorized by the Constitution itself," and held that the "only questions" that need be raised to ascertain the constitutionality of civil rights legislation premised upon that power are "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* at 258-259. *See also Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964).

If the Set-Aside Amendment is judged by the standard applied in these cases, it should be upheld if Congress' conclusion that the Set-Aside was needed to remedy past discrimination against minority businesses has a rational basis, and if the means selected by Congress are reasonable and appropriate. The evidence before Congress of past discrimination against minority businesses unquestionably provides a rational basis for this legislative action.[12] As bluntly observed by the Second Circuit below, "[t]he amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors," and "any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine." *Fullilove* v. *Kreps*, 584 F.2d 600, 604-05 (2d Cir. 1978), *cert. granted*, 99 S.Ct. 2403 (1979). Moreover, the means that were selected to remedy the effects of past discrimination and that were embodied in the Set-Aside

[12] *See University of California Regents* v. *Bakke*, 438 U.S. at 307-310. Petitioners conceded below that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination." *Fullilove* v. *Kreps*, 584 F.2d at 603. Legislation that serves a compelling state interest is, a fortiori, rationally based.

Amendment are similar to those previously found "reasonable and appropriate" by this Court. *See, e.g., United Jewish Organization* v. *Carey*, 430 U.S. 144 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Because remedying past racial discrimination provides, at the very least, a rational basis for legislative action, and the means selected are reasonable and appropriate, the Set-Aside Amendment should be upheld.[13]

[13] Petitioners contend that the Set-Aside violates the Fifth Amendment because it discriminates against firms that are neither owned nor controlled by members of the minority groups named in the legislation. The argument fails because it overlooks Congress' broad powers under the enforcement clauses of the Civil War Amendments to take special steps—whether or not those steps might otherwise be barred—to aid those freed from slavery as a result of a civil war and several constitutional amendments. Such actions serve the express and dominant purpose of the Civil War Amendments, recognized by this Court shortly after their ratification:

> "We repeat then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .
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> "We do not say that no one else but the negro can share in this protection. . . . But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

Slaughter House Cases, 83 U.S. 36, 71-72 (1872). *See also Strauder* v. *West Virginia*, 100 U.S. 303, 306 (1879) ("[The fourteenth amendment] is one of series of constitutional provisions having a common purpose; namely, securing to a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy . . . ."). Inherent in that purpose is the power

The petitioners argue that the Set-Aside Amendment, like the race-conscious actions of state and local governments, must survive "strict scrutiny" before this Court may uphold it—that is, that the statute must be shown to be a "less restrictive means" of accomplishing a "compelling governmental interest." While, as we show in Part I, D. *infra*, the statute satisfies even these stringent tests, petitioners' legal arguments lack merit.

First, the cases cited by petitioners—notably *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), *Personnel Administrator* v. *Feeney*, 99 S.Ct. 2282 (1979), and the cases cited therein—all involve state and local action. The situation is quite different when Congressional action—and particularly Congressional action pursuant to the thirteenth and fourteenth amendments—is involved. Only Congress, not a state legislature or a state Board of Regents, has the explicit constitutional power to devise remedies for past racial discrimination. It has been a century since this Court last struck down a statute enacted by Congress pursuant to this power. In the area of sex discrimination, where the use of suspect classifications has been carefully examined, this Court has explicitly approved Federal statutes that include gender classifications designed to compensate for past discrimination against women. *E.g., Califano* v. *Webster*, 430 U.S. 313, 317 (1977) (approved statutory provision whose " 'only discernible purpose [is] the permissible one of redressing our society's longstanding disparate treatment of women' ") (quoting *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n.8 (1977)).

Second, this Court has repeatedly condoned—even mandated—race-conscious remedies for past discrimination,

to favor—in a rational and appropriate manner—those whose triumph over discrimination lies within the zone of interests intended to be protected by the Civil War Amendments.

because it has recognized that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *see, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Associated General Contractors* v. *Altshuler*, 490 F.2d 9, 16-17 (1st Cir. 1973) *cert. denied*, 416 U.S. 957 (1974) and the cases cited therein. Congress should not be discouraged from utilizing such remedies if it deems them appropriate. The imposition of an unrealistic standard of judicial review might well have such an effect.

Finally, even if "strict scrutiny" makes sense when courts are reviewing the race-conscious actions of local government units or federal statutes that are *not* premised on the Civil War Amendments, a lower standard is proper when Congress is clearly acting pursuant to its constitutional powers to remedy the effects of past racial discrimination. This Court should encourage Congress to accept the obligation placed upon it by the framers of the Civil War Amendments. The controversial issues and conflicting public policy concerns raised by the use of race-conscious remedies should be debated and resolved in the forum best suited to consider such questions: the national legislature. Congress, not this Court, was chosen by the framers of the Civil War Amendments to be chiefly responsible for their enforcement. "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . . . It is the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (emphasis in original); *see Katzenbach* v. *Morgan*, 384 U.S. 641, 648-649 (1966).

This Court is well aware of the public controversy surrounding statutes like the Set-Aside amendment. That controversy has, to date, largely been thrashed out in amicus briefs filed in this Court. While to some extent this focus is inevitable, the Court can and should now take an important step toward moving the debate to the halls of Congress. It can do so by holding that "strict scrutiny" standards do not apply to race-conscious actions of Congress that are designed on their face to remedy the effects of past discrimination pursuant to the enforcement powers granted in the Civil War Amendments.[14]

B. The Set-Aside Amendment Is Constitutional Notwithstanding the Absence of Detailed Legislative Findings of Discrimination.

Citing scattered *dicta* in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), petitioners claim that the Set-Aside Amendment should be struck down because it was not accompanied by findings of past discrimination against MBEs and it cannot, therefore, be shown to serve a compelling governmental interest. Whatever the proper scope of review, the petitioners' assertion that the constitutionality of a federal statute turns on the volume and specificity of its legislative history is unsupportable.

The Constitution does not require that a legislature conduct hearings, build a record and make formal findings when it passes a law. *Perez* v. *United States*, 402 U.S. 146, 156-57 (1971); *Oregon* v. *Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring in part and dis-

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[14] Amici do not, of course, believe that Congress can use these "enforcement" powers under the Civil War Amendments in ways which encourage or entrench discrimination against the very racial minorities the Amendments were designed to protect. *See Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n.10 (1966); discussion in note 13, *supra*.

senting in part); *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (Holmes, J.). As Professor Cox has noted, "[t]he Court does not review the sufficiency of the evidence in the record to support congressional action . . . and the practice of relying upon the legislative record when it exists should not be taken to show that such a record is required." Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966) [hereinafter cited as "Cox"].

This rule derives from basic separation of powers principles embodied in the Constitution's grant to Congress of the power to "determine the Rules of its Proceedings." U.S. Const., art. I, § 5. Indeed, when Congress acts pursuant to an express grant of constitutional authority to pass all laws "necessary and proper" or "appropriate" to the exercise of powers conferred upon it—as it did in enacting the Set-Aside Amendment—the courts, far from requiring a detailed legislative history or findings, have "long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment upon questions of degree and proportion." Cox at 107.

The relevant cases support this analysis. They uniformly hold that a statute "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *James* v. *Strange*, 407 U.S. 128, 133 (1972). In the absence of any legislative history, both the existence of facts supporting the legislature's judgment and the legislature's awareness of those facts will be presumed. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Carmichael* v. *Southern Coal & Coke Co.*, 301

U.S. 495, 509-10 (1937). Indeed, provided the resulting statute is constitutionally supportable, even legislative history or other evidence indicating that Congress may have acted for improper reasons has been found to be constitutionally irrelevant.[15] To put it bluntly, as long as Congress acts within the scope of its constitutional powers, it is not the province of this Court to instruct it on the kind of hearings it must hold or the "findings" it must make.

The judgments of Congress, as opposed to those of a city council or a state legislature (or, for that matter, a state Board of Regents) are entitled to particular deference because Congress alone among the nation's legislatures is the constitutional equal of this Court. Moreover, as a large and popularly elected body Congress is far more likely than the Court to mirror the national will —a consideration of importance in a country founded upon the sovereignty of the people. Judicial restraint in the review of federal statutes follows naturally from the realization that courts "are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis* v. *United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). *See* L. Hand, The Bill of Rights 11-18 (1958); A. Bickel, The Least Dangerous Branch (1962). In reviewing civil rights leg-

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[15] *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature. . . . It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it."); *Barenblatt* v. *United States*, 360 U.S. 109, 132 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."); *Communist Party of U.S.* v. *Subversive Activities Control Board*, 367 U.S. 1, 86 (1961) (Frankfurter, J.).

islation, this Court has often recognized "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its *discretionary* authority to take *appropriate* remedial measures." *Regents of the University of California* v. *Bakke*, 438 U.S. at 302 n.41 (Powell, J.) (emphasis added); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-653 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-27 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

Respect for the democratic process and the separation of powers is not the only reason why courts do not require legislatures to hold hearings or make express, detailed findings:

> "The principle is not merely one of deference to Congress or the states. It rests upon appreciation of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor." Cox at 105.

Legislatures are not courts. The latter attend to the development of the law through reasoned elaboration from precedent. They generally act retroactively, deciding only the cases and controversies before them on the basis of a record largely supplied by the parties. Legislatures, by contrast, make law through a process of bargaining, compromise, and "horse trading." Congress is a large, intentionally diverse body whose lot in life is to hammer out laws that please no one fully but stand nonetheless as expressions of the national will. It acts prospectively, drawing information and ideas not merely from hearings, debates, and committee reports but also

from constituents, interest groups, and the executive branch, all of whose contributions, as like as not, are literally "off the record." "In the nature of the case [a legislature] cannot record a complete catalog of the considerations which move its members to enact laws." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. at 510. Indeed, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ." *United States* v. *O'Brien*, 391 U.S. at 384.

Lumping congressional determinations with administrative and judicial findings is therefore inappropriate. Congress will not behave as a court because it cannot (and should not) do so, and imposing judicial formalities upon it will not produce more "reasoned" decisions. The objectives of requiring other tribunals to base their decisions upon express findings, however desirable, will not be advanced by asking—or expecting—Congress to follow suit.[16]

Indeed, requiring findings or a detailed legislative history before permitting Congress to enact legislation would likely produce unintended and undesired consequences. It would, for example, focus attention and resources on the preparation of legislative history rather than more careful consideration of the text of pending bills, because the difference between a void law and a valid one would no longer necessarily be found in the statutes themselves but in the reports and debates accompanying them. The temptation to manufacture legislative history—already overwhelming in the view of many—would doubtless grow. This Court has rejected invitations to look behind statutes expressly to avoid this result: "We decline to void essentially on the ground that it is unwise legislation which Congress had the un-

[16] *See Ohio Contractors Ass'n* v. *Economic Dev. Admin.*, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978).

doubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States* v. *O'Brien*, 391 U.S. at 384.

Moreover, petitioners' arguments fly in the face of the fact that provisions added (as the Set-Aside Amendment was) on the floor of one or both Houses are at least as legitimate, under any sound theory of legislation, as provisions supported by heavy volumes of hearings and committee reports. Floor Amendments such as the Set-Aside have been specifically approved or disapproved by a vote of the entire chamber; there can be no doubt that they command the support of at least a voting majority. However lengthy and detailed the legislative history of some other provision of a bill, it is always a matter of conjecture whether a majority of the legislature would have supported it if it had been voted upon separately. Yet the petitioners would have this Court adopt a rule that severely disadvantages floor amendments—almost by definition unreflected in committee reports and less likely than other provisions to have been addressed at length during hearings—when they are subjected to judicial review. Such a result makes no sense. The legitimacy of legislation derives from its enactment by popularly elected representatives, not from the arguments that their unelected staffs find persuasive enough to write into committee reports.

C. The Facts and Findings Before Congress When the Set-Aside Amendment Was Passed Justified its Enactment as a Remedy for Past Discrimination.

Petitioners point to the legislative history of the Set-Aside Amendment and argue that the brevity of debate on the measure and the absence of either express findings in the statute or a discussion of the Amendment in the House and Senate Reports accompanying the Act demonstrate that the Amendment is not sufficiently supported by detailed, express findings to sustain its constitutionality. But even if such findings were required, the factual record before Congress when the Set-Aside was passed was sufficient to sustain it.

The legislative history of the Set-Aside Amendment in the House and Senate, although brief, conclusively establishes that Congress' purpose in passing the Amendment was to remedy the effects of identifiable past discrimination against minority contractors. Representative Mitchell, in offering the Set-Aside Amendment, stressed that "all this amendment attempts to do is to provide that those who are in minority businesses get a fair share of the action from this public works legislation." 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977). This was, in Representative's Mitchell's view, "the only sensible way . . . to begin to develop a viable economic system for minorities in this country" because minority enterprise people are "so new on the scene . . . [and] so relatively small that every time [they] go out for a competitive bid, the larger, older, more established companies are always going to be successful in underbidding [them]." *Id.* at H1437. Senator Brooke, who introduced the Set-Aside provision in the Senate, voiced a similar concern in arguing that the Set-Aside was "a legitimate tool to insure participation by hitherto excluded or unrepresented groups." *Id.* at S3910 (daily ed. March 10, 1977). Others supported the Set-Aside because it would redress the inability of minority-owned businesses to compete effectively "through no fault of their own," *id.* at H1440 (daily ed. February 24, 1977) (remarks of Rep. Conyers); and it would insure that the PWEA would not be inequitable to minority businesses, *id.* at H1440 (remarks of Rep. Biaggi).[17]

[17] So clear was Congress' intent that at least one of the amici *supporting* petitioners concedes that "Congress, in enacting the minority business set-aside, was obviously attempting to direct

The record before Congress was not, moreover, limited to the debates and findings accompanying the PWEA. A legislature is free to (and does) consult a range of extrinsic sources of factual material, ideas, and opinion—including the reports and data generated by other branches of the federal government and its own prior legislative activities. This Court, when seeking clues to congressional intent or referring to information upon which Congress may be said to have based a judgment, has therefore not hesitated to go beyond the bounds of formal legislative history and to consider all material generally available to Congress and on which Congress may reasonably have relied, particularly when considering subjects (such as civil rights) marked by intense and sustained legislative activity. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653, 655-58 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112, 132-34 (1970).[18]

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public works contracts to certain classes of U.S. citizens deemed to be historical victims of racial and ethnic discrimination. . . ." Brief of The Anti-Defamation League of B'Nai B'Rith, Amicus Curiae, in Support of Petitioners at 7 (1979).

[18] *See also Ohio Contractors Ass'n* v. *Economic Dev. Admin.*, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977) *aff'd.* 580 F.2d 213 (6th Cir. 1978) ("A court is not limited to the 'record' compiled by Congress in its determination of the necessity of a particular piece of legislation to cure an evil of compelling importance. To the extent that the assumptions underlying a Congressional finding of necessity are verified in separate but reliable reports and studies not in the 'Congressional Record' of the legislation, the Court may consider such data."); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338, 355 (D.R.I. 1978) ("Judicial review takes into account any facts, not necessarily those actually considered by Congress, that underlie and support the congressional assumption that the effects of past discrimination continue, particularly when those facts are so well known and have been exhaustively documented in congressional reports, presidential commissions and countless other proceedings over the past two decades.") (citations omitted).

When it enacted the Set-Aside Amendment in 1977, Congress had before it twenty years of legislative, executive, and judical findings that confirm the facts that petitioners would have the Court believe Congress neither addressed nor determined. Indeed the volume of material available to Congress in 1977 on the problems facing MBEs—and the broader issue of economic discrimination against minorities—is large and persuasive enough, standing alone, to explain the brief legislative history of the amendment. The fact and history of racial discrimination in this country, in economic as well as social and political affairs, is writ too large for this Court to require its rediscovery and recitation in every civil rights statute. As succinctly phrased by the Second Circuit, "the lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry." *Fullilove* v. *Kreps*, 584 F.2d at 605-06 n.10. *See Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338, 348 n.4 (D.R.I. 1978) ("Congress has sufficiently familiarized itself over the past decade with the nature of discrimination that it need not repeat lengthy legislative findings of fact.").

When Congress enacted the Set-Aside Amendment early in 1977 it had before it, first, a decade and a half of "comprehensive legislation . . . for the benefit of those minorities who have been victims of past discrimination." *Fullilove* v. *Kreps*, 584 F.2d at 605.[19] Virtually all of

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[19] The statutes cited by the Second Circuit include: Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6); Pub. L. No. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17); Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9); Pub. L. No. 98-608, § 3(1), 88 Stat. 1972 (codified at 42 U.S.C. § 2000e-4) Pub. L. No. 94-273, § 3(24), 90 Stat. 377 (codified at 42 U.S.C. § 2000e-14); Voting Rights Act of 1965; Pub. L. No. 89-110, 79 Stat. 437; Pub.

this legislation was preceded by exhaustive hearings, enacted only after extensive debate, and accompanied by specific findings of past social, political, and/or economic discrimination.

Second, Congress had before it reports by a variety of congressional committees that repeatedly found discrimination against minorities to be a principal cause of their underrepresentation in the private sector. Thus, on the basis of five days of hearings the House Select Committee on Small Business concluded in 1972 that "the minority businessman does not play a significant role in our economy" due to major problems which, though "economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H.R. Rep. No. 1615, 92d Cong., 2d Sess. 3 (1972). On two subsequent occasions the Committee has reaffirmed this basic conclusion. *See* H.R. Rep. No. 468, 94th Cong., 1st Sess. 2 (1975); H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted at p. 5, *supra*).

Since passage of the Set-Aside Amendment, Congress has done nothing to disavow these findings. To the contrary, in 1978 Congress enacted a series of amendments to the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, 92 Stat. 1757, Title II of which included specific findings that minorities lack the opportunity for "full participation in our free enterprise system" because they "have suffered the effects

L. No. 90-284, title I, § 103(c) 82 Stat. 75; Pub. L. No. 91-285, §§ 3-6, 84 Stat. 315; Pub. L. No. 91-405, title II, § 204(e), 84 Stat. 853; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, title II, §§ 204, 206, title IV, § 405, 89 Stat. 402, 404 (codified at 42 U.S.C. § 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified at 18 U.S.C. §§ 231-233, 241, 242, 245, 1153, 2101, 2102; 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341, 28 U.S.C. § 1360 nts.; 42 U.S.C. §§ 1973, 3533, 3535, 3601-3619, 3631); Pub. L. No. 93-265, 88 Stat. 84 (codified at 25 U.S.C. § 1341). 584 F.2d at 605 n.7.

of discriminatory practices or similar invidious circumstances over which they have no control." The reports accompanying the legislation supported these findings in detail.[20]

Third, Congress could have examined the numerous Presidential documents and executive branch studies and reports discussed by Amici at pp. 5-6, *supra*. For example, Executive Order No. 11,518, 3 C.F.R. 109 (1970), expressly states that "members of minority groups traditionally have aspired to own their own businesses," but that "members of certain minority groups through no fault of their own have been denied the full opportunity to achieve these aspirations." The long history of frustration and lost potential of minority business, and the potential contribution of minority businesses to the nation's economy were reemphasized by the President in his 1971 Message to Congress on Expansion of Minority Enterprise Program, H.R. Doc. No. 169, 92d Cong., 1st Sess. 4 (1971), and again in 1972 in his Message to Congress on Minority Enterprise, H.R. Doc. No. 194, 92d Cong., 2d Sess. 1 (1972). *See also* Exec. Order No. 11,625, 3 C.F.R. 213 (1971).[21]

[20] *See, e.g.*, H.R. Rep. No. 949, 95th Cong., 2d Sess. 8 (1978) (many are "socially and economically disadvantaged" as a result of their identification as "members of certain racial categories"); S.Rep. No. 1070, 95th Cong., 2d Sess. 14-15 (1978) ("[A] pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." The act is justified because of "the historic past discrimination of minorities as a group in their efforts to participate in the free enterprise system."); H.R. Rep. No. 1714, 95th Cong., 2d Sess. 20-21 (1978); S. Rep. No. 31, 96th Cong., 1st Sess. 107, 123-24 (1979).

[21] *See also* President's Advisory Council on Minority Business Enterprise, Minority Enterprise and Expanded Ownership: Blueprint for the 70s, at 5, 10-18 (1971). The Executive Departments have conducted their own studies of discrimination against minority-owned businesses, and the results of many such studies were available to Congress in 1977. The Department of Commerce's Office of Minority Business Enterprise in a series of reports

Fourth, Congress could have taken heed of the decisions of this and other Federal courts. Since the early 1950's literally hundreds of cases have concluded with a finding of racial discrimination in the exercise of political, economic, or social rights. This Court has itself observed and passed upon racial and ethnic discrimination on scores of occasions since 1954. Federal court cases finding discrimination in the construction industry are so numerous, and the sorry record of the industry is so clear, that only last Term this Court, citing half a dozen cases and numerous other authorities, observed that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a

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published during the 1970s has documented how prejudice, poor educational opportunity, and limited access to real management positions, resulting from the exclusion of minorities from various sectors of our economy, have all contributed to the severe shortage of minority entrepreneurs with general business skills in today's marketplace. *See, e.g.*, OMBE, U.S. Dep't of Commerce, Building Minority Enterprise 2 (1970); OMBE, U.S. Dep't of Commerce, Progress Report: The Minority Business Enterprise Program 1972, at 3 (1972); OMBE, U.S. Dep't of Commerce, Report of the Task Force on Education and Training for Minority Business Enterprise 17 (1974); OMBE, U.S. Dep't of Commerce, Federal Procurement and Contracting Training Manual for Minority Entrepreneurs 38-39 (1975); OMBE, U.S. Dep't of Commerce, Minority Enterprise Progress Report (1976).

OMBE has not been alone in its conclusion. The Department of Health, Education and Welfare has cited "barriers of racial discrimination" as an obstacle to minority entrepreneurs seeking credit, Office of Education, U.S. Dep't of Health, Education and Welfare, Minority Ownership of Small Business: Instructional Handbook 1 (1972), and has published a collection of case histories of minority businesses demonstrating the reality and effect of racial discrimination, Office of Education, U.S. Dep't of Health, Education and Welfare, Minority Ownership of Small Business: Thirty Case Studies (1972). The General Accounting Office, examining the effect of Federal programs designed to aid minority businesses, cited social discrimination as a factor that has limited the growth of minority business enterprises. General Accounting Office, Limited Success of Federally Financed Minority Businesses in Three Cities 5 (1973).

proper subject for judicial notice." *United Steelworkers* v. *Weber*, 99 S.Ct. 2721, 2725 n.1 (1979).[22]

Finally, Congress might well have taken notice of the facts on minority enterprise reflected in the reports of the Census Bureau and discussed at pp. 2-4, *supra*. These statistics, a proper subject for judicial notice,[23] demonstrate conclusively that minorities are underrepresented in the ownership and management of private companies, and give rise to an inference that this is the result of prior racial discrimination. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

Given the legislative history and the facts available to Congress when it enacted the Set-Aside Amendment in 1977, the argument that Congress neither made a "finding" of past discrimination nor intended the amendment to remedy the effects of such discrimination must be rejected.

D. The Set-Aside Amendment Satisfies the Other, Stricter Standards of Review Suggested by Members of This Court.

1. *The Statute Satisfies the Test Suggested by Mr. Justice Brennan.*

In an opinion for four members of the Court in *Bakke*, Mr. Justice Brennan suggested an alternative standard of review for racial classifications designed to serve remedial purposes. Under that standard, such classifications are to be sustained if they serve important

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[22] *See also Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. at 355-56 and the cases cited therein.

[23] *Mitchell* v. *Rose*, 570 F.2d 129, 132 n.2 (6th Cir. 1978), *United States* v. *United Bhd. of Carpenters & Joiners, Local 169*, 457 F.2d 210, 214 n.7 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *cf. Castaneda* v. *Partida*, 430 U.S. 482, 486-89 (1977).

and articulated governmental objectives and if they are substantially related to achievement of those objectives; they are to be overturned if they are used to stigmatize a minority group. *See also United Jewish Organizations* v. *Carey*, 430 U.S. at 163 (race-conscious reapportionment upheld when found "*reasonably related* to the constitutionally valid statutory mandate of maintaining nonwhite voting strength") (emphasis added).

Of course, the *Bakke* standard was not designed for cases like this one, where Congress has specifically created a racial classification for the purpose of enforcing the Civil War Amendments. In *Bakke*, the classification was created by a state agency lacking the constitutional powers accorded to Congress. But even if the standards suggested in Mr. Justice Brennan's opinion were applied in this case, the Set-Aside Amendment would pass muster.

Congress' manifest purpose of remedying the effects of past discrimination against minority business enterprises in the construction industry is obviously sufficiently important to meet the first element of Justice Brennan's test. Certainly, as the facts set forth above demonstrate, Congress had a sound basis for believing that the problem of underrepresentation of minorities in the construction industry had been both "substantial and chronic;" that this serious and persistent underrepresentation was the result of handicaps under which minorities labor as a result of deliberate, purposeful discrimination against them in the private sector generally and in the construction industry specifically; and that these handicaps had impeded full participation by minority enterprises in the economic marketplace. Congress also had substantial reasons to believe that this pattern of underrepresentation would be perpetuated indefinitely if the Set-Aside provision or some similar measure were not enacted.[24]

[24] Justice Brennan stressed in *Bakke* that cases decided under Title VII have made clear "that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination." 438 U.S. at 366. That is all Congress has done in this case.

Moreover, Congress' use of the set-aside techinque was not unreasonable in light of its objectives. Increasing the level of participation of MBEs in the construction industry, the manifest purpose of the Set-Aside, could not reasonably have been achieved without the Set-Aside Amendment. Where racial discrimination has been found, race-conscious remedies may be needed. As this Court noted in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971):

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

Finally, the Set-Aside Amendment satisfies the last portion of Justice Brennan's test: that the classification not stigmatize any discrete group or individual or single out those least well represented in the political process to bear the brunt of the effects resulting from the classification.[25] The Set-Aside did not burden any discrete and insular, or even any identifiable, non-minority group in any significant matter. Its sole effect on "majority" contractors was to restrict their possible business to 99¾%—rather than 100%—of the funds expended on construction work in late 1977 and early 1978. *See Fullilove* v. *Kreps*, 584 F.2d at 607; *United Jewish Organizations* v. *Carey*, 430 U.S. at 165-68.

[25] Contrary to petitioners' assertions (Brief for Petitioners at 13; Brief for Petitioner General Building Contractors of New York State at 32-33), the Set-Aside does not stigmatize the MBEs that it is designed to benefit. The Set-Aside was designed to allow MBEs to establish a sufficient economic foothold to compete with existing construction enterprises. The program has achieved notable success in this regard. *See* Interim Report at 19, 24.

In sum, the Set-Aside Amendment does not violate the Equal Protection and Due Process clauses of the fifth and fourteenth amendments when judged by the standard of review articulated by Mr. Justice Brennan in *Bakke*.

2. *The Statute Meets Even the Most Stringent "Strict Scrutiny" Test.*

The Second Circuit, applying the strict scrutiny standard to the Set-Aside Amendment, concluded that the Amendment did not violate the Constitution. Although application of such a strict standard of review is not warranted, *see* pp. 17-19, *supra*, the Second Circuit correctly applied the standard to the facts of this case.

Under the strict scrutiny standard, a government practice or statute can only be justified if it furthers a compelling governmental purpose and if no less restrictive alternative is available. *See, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Petitioners have conceded—and the court below properly concluded—that the government has a compelling interest in remedying "the vestiges of present and/or past discrimination." *Fullilove* v. *Kreps*, 584 F.2d at 603. The Second Circuit also concluded that Congress' manifest purpose in enacting the Set-Aside was to remedy past racial discrimination, and that such discrimination has in fact occurred. *Id.* at 605-06. Neither finding is vulnerable to serious challenge.

Congress' intent in enacting the Set-Aside provision is so clear as to be beyond dispute. The sponsor of the floor amendment in the House of Representatives containing the Set-Aside provision, Congressman Mitchell, explained that the Set-Aside was intended to target funds for minority enterprises to insure that "they get a fair share of the action from this public works legislation." 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977). As the

Second Circuit noted, "any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine." *Fullilove* v. *Kreps*, 584 F.2d at 605.[26]

Moreover, Congress' remedial actions in enacting the Set-Aside were predicated on and were consistent with a substantial and uniformly supportive record. The legislative record, viewed in its entirety, establishes the following critical points: (1) the historical presence of discrimination in the construction industry against minorities and MBEs; (2) the present effect of this past discrimination of precluding MBEs from successfully bidding competitively against older, more established, and bigger non-minority firms; and (3) that absent a Set-Aside, MBEs' inability to compete on an equal footing likely will continue. Indeed, the compelling nature of the legislative record concerning the Set-Aside Amendment has already been acknowledged by four members of this Court in *Bakke*, in the context of a discussion of the scope of Title VI:

> "The legislative history of this race-conscious legislation [the Set-Aside Amendment] reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises. It was believed that such a 'set-aside' was required in order to enable minorities, still 'new on the scene' and 'relatively small,' to compete with larger and more established companies which would always be successful in underbidding minority enterprises."

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[26] Petitioners suggest that the Congressional intent in adopting the PWEA and appropriating the funds for Round II was to aid disadvantaged, as opposed to minority, small businesses. Although we do not dispute that this was a general goal of the PWEA, it is no way inconsistent with the more specific goal of remedying the effects of past discrimination.

438 U.S. at 348-49 (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part) (footnotes omitted).

Nor is the Set-Aside vulnerable to attack because of the purported availability of less restrictive alternatives. The ten percent Set-Aside was drawn with precision and tailored to serve the legislative objective sought by Congress. Although characterized by Petitioners as a rigid quota, the Set-Aside Amendment is in fact quite flexible. The statutory requirement may be waived in whole or in part;[27] as of September 5, 1978, 589 such waivers had in fact been granted. Interim Report at iv, 18. Among the factors that may be considered in passing on a waiver request are the size of the minority population in the project area, the availability of MBEs in the area, the efforts already made to find MBEs, and any other pertinent factors. *See* EDA, Dep't of Commerce, Guidelines for 10 Percent Minority Business Participation in Local Public Works Grants (Aug. 1977). The Set-Aside, moreover, does not straight-jacket grantees, but enables them to comply with the statutory requirement in a variety of ways depending upon the nature of the project. And the Set-Aside applies only to Round II grants, which were of a limited temporal duration; it does not create a permanent racial preference. *See United Steelworkers* v. *Weber*, 99 S. Ct. 2721, 2734 (1979) (Blackmun, J., concurring). Finally, the size of the Set-Aside is reasonable—indeed modest—when viewed against the fact that at least 16% of the nation's population belongs to one of the minority groups benefitted by the Amendment. *See* p. 3, *supra*.

Congress did not act precipitously in resorting to the Set-Aside as a remedial device. Prior efforts to remedy the effects of past discrimination had failed to produce

[27] The implementing regulations provide that the Assistant Secretary of Commerce can waive the Set-Aside requirement if he determines that the Set-Aside "cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." 13 C.F.R. § 317.19(b)(2) (1978).

meaningful results. The more general provisions of the Civil Rights Act of 1964, although designed to prohibit certain types of discrimination against minorities, have not significantly mitigated the effects on MBEs of past discrimination. And Section 8(a) of the Small Business Act of 1953, 15 U.S.C. § 637(a) (1976), which authorizes the Small Business Administration to grant Government subcontracts to socially or economically disadvantaged businesses, has proved ineffective.[28] Thus, this is not a situation where Congress in the first instance sought to impose a Set-Aside as a remedy for past discrimination. Other remedial measures have been tried and found wanting.

Ignoring this background, petitioners contend that Congress did not in 1977 consider less restrictive alternatives to the Set-Aside, and suggest a variety of alternatives that they characterize as less onerous or burdensome than the means selected by Congress. Brief for Petitioners at 26-28; Brief for Petitioner, General Building Contractors of New York State at 24-31. These alternatives tend to fall into one of two categories: either they avoid racial classifications altogether (*e.g.*, a set-aside provision for economically and socially disadvantaged business enterprises) or they provide assistance to MBEs in a form other than a Set-Aside (*e.g.*, technical, financial and educational assistance programs, encouragement of joint-ventures between non-minority construction firms and MBEs, and/or loans or grants to cover bonding expenses).

[28] According to a 1975 report by the General Accounting Office, the Small Business Administration's "success in helping disadvantaged firms to become self-sufficient and competitive has been minimal." Cong. Research Service, Library of Congress, Minority Enterprise and Public Policy 53 (June 1977). *See also* General Accounting Office, Limited Success of Federally Financed Minority Businesses in Three Cities (1973).

The alleged availability of such alternatives does not undermine the constitutionality of the Set-Aside provision. The suggested alternatives that do not involve racial classifications are no more likely to be effective than the Small Business Administration's Section 8(a) program. The other alternatives are no "less restrictive" than the Set-Aside. They, too, utilize racial classifications and make designated government benefits available only to certain racial groups. *See Constructors Association* v. *Kreps*, 573 F.2d 811, 817 n.23 (3d Cir. 1978). The fact that the benefits suggested by petitioners are less offensive to them than the Set-Aside does not mean that they are less restrictive; in all likelihood it means only that they are less likely to be effective. In fact, petitioners' suggestions would give minority firms a financial advantage in competing for *all* construction contracts and in that sense are far more restrictive than the Set-Aside, which reserved for minorities only about 1/400th of the dollars spent on construction in the United States in 1977. *Fullilove* v. *Kreps*, 584 F.2d at 607-08. The proper body to judge the relative effectiveness and burdens associated with such remedies is clearly the Congress, and not this Court.

II. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT MANDATE INVALIDATION OF THE SET-ASIDE AMENDMENT.

Petitioners argue that the Set-Aside Amendment should be struck down because it is not consistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976).[29] Brief for Petitioners at 28-38; Brief for Petitioner, General Building Contractors of New York State at 33-35. The argument is without merit.

[29] Title VI provides, in its entirety, that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

A. Title VI and the Set-Aside Amendment Are Consistent and Capable of Coexistence.

"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).[30]

Five justices of this Court have agreed that Title VI proscribes only racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 281-87, 328-55 (1978) (opinions of Powell, J. and Brennan, White, Marshall and Blackmun, J.J.). Because, as Amici have demonstrated above, *see* pp. 12-19, 31-38, *supra*, the Set-Aside does not violate the Equal Protection Clause, it is not inconsistent with Title VI.

The consistency of the Set-Aside Amendment and Title VI is also supported by the decision of this Court in *United Steelworkers* v. *Weber*, 99 S.Ct. 2721 (1979). There, the Court held that quotas designed to increase minority participation in the skilled workforce of a plant could be consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976). Title VII, in sweeping language similar to that found in Title VI, outlaws employment discrimination on grounds of "race, color, religion, sex, or national origin." The Court held in *Weber* that Title VII does not forbid all voluntary

[30] *See also Administrator, F.A.A.* v. *Robertson*, 422 U.S. 255 (1975); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible. . . .").

private programs designed to eliminate conspicuous racial imbalances through quotas that reserve a specific portion of training program openings for black employees. Given that holding, it is inconceivable that Title VI precludes federal grantees from doing what the Set-Aside Amendment requires them to do in order to receive federal funds.

The rule quoted in *Morton* v. *Mancari* means nothing if it does not mean that the Court will go to greater lengths to reconcile two federal statutes than to reconcile a federal statute and a private contract. It follows from *Weber*, therefore, that a statute designed to eliminate conspicuous racial imbalances in the construction industry by the use of quotas reserving a specific portion of certain federal funds for minority contractors is not necessarily inconsistent with Title VI. Title VI and the Set-Aside Agreement are capable of co-existence and both should be given effect.[31]

[31] In fact, Congress was aware of Title VI when it passed the Set-Aside Amendment and apparently believed the two to be consistent:

> "What is most significant about the congressional consideration of the [Set-Aside Amendment] is that although the use of a racial quota or 'set-aside' by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition 'will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964.' 42 U.S.C.A. § 6709 (1976). Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% 'set-aside' for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI."

Regents of the University of California v. *Bakke*, 438 U.S. at 349 (Brennan, White, Marshall and Blackmun, J.J., concurring in part and dissenting in part).

B. To the Extent that Title VI and the Set-Aside Amendment May Be Inconsistent, the Set-Aside Amendment—a Later-Enacted, More Specific Statute—Should Prevail with Respect to the Program of Which it Is a Part.

It is an accepted rule of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974), *citing Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961).

Title VI is unquestionably a statute of general application. The Set-Aside Amendment, by contrast, is a narrow and specifically drawn provision that allocates a portion of the funds to be spent on a single program of limited scope and duration. Following the general rule, the Set-Aside Amendment should be regarded as an exception to (or qualification of) Title VI that displaces the latter insofar as it might otherwise govern the distribution of PWEA funds.

The case for the Set-Aside Amendment is further, and finally, bolstered by the fact that it was enacted thirteen years after Title VI. In resolving a conflict between successive statutory enactments that is deemed irreconcilable, the latter enactment should be given priority. *Araya* v. *McLelland*, 525 F.2d 1194, 1196 (5th Cir. 1976).[32]

[32] *See Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Hines, Inc.* v. *United States*, 551 F.2d 717, 725 (6th Cir. 1977); *United States* v. *Ohio Valley Co.*, 510 F.2d 1184, 1189 (7th Cir. 1975); *Int'l Union of Elec. Radio & Mach. Workers* v. *NLRB*, 110 U.S. App. D.C. 91, 289 F.2d 757 (1960) (Bazelon, J.).

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

Brief of The National Bar Association, Inc. and The American Business Council, Inc. Amici Curiae

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IN THE

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v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 584 F.2d 600 (2d Cir., 1978). It affirmed the decision of the United States Dis-

trict Court for the Southern District of New York (Werker, J.), reported at 443 F. Supp. 253 (S.D.N.Y. 1977), which upheld the constitutionality of Section 103 (f) (2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705 (f) (2).

JURISDICTION

The petition for a Writ of Certiorari was filed on December 21, 1978 and granted on May 21, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSENT TO FILING

This Amici Curiae is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICI CURIAE

The National Bar Association, 1900 L Street, N.W., Washington, D.C. 20036, is a professional membership organization which represents the more than 7,000 black attorneys, judges and law students in the United States. The officers of the Association are as follows:

Robert L. Harris, President
William A. Borders, Jr., President-Elect
George R. Burrell, Jr., Vice-President
Warren H. Dawson, Vice-President
Stuart J. Dunnings, Jr., Vice-President
Renee Jones Weeks, Vice-President
Arnette R. Hubbard, Secretary
Arthenia L. Joyner, Treasurer
John Crump, Executive Director

The National Bar Association was incorporated under the laws of the State of Iowa in 1925, over two decades before black attorneys were allowed membership in the American Bar Association, and at the time when very few law schools in the United States admitted black students.

The Articles of Incorporation of the National Bar Association state the objectives of the Association, in part, as being:

> ". . . to advance the science of jurisprudence, uphold the honor of the legal profession, . . . and protect the civil and political rights of all citizens of the several states of the United States."

One of the primary reasons for the birth of the Association in 1925, was to achieve equalization of opportunities for minorities in the legal profession in order to further the goal of equal justice for all. In its fifty-four years, the Association has seen the number of black attorneys in the United States grow from a fraction of a percentage of the total, to almost two percent today. However, Blacks, as well as other minorities and women, are still grossly under-represented in the legal profession and also the medical and other professions.

Thus far, the most effective methods proven to ameliorate that condition and certainly the most critical factors in doubling the number of black attorneys in America in the past decade, has been the affirmative action programs initiated in a number of law schools since around 1968. This was also the year that the National Bar Association, in partnership with the American Bar Association, the American Association of Law Schools and the Law School Admissions Council, founded the Council on Legal Education Opportunity whose stated goal was to increase the enrollment of minority students in American law schools.

The legal profession has perhaps been more significant than any other in shaping the fortunes and destinies of the American people, majority and minority alike. It is common knowledge that until a few years ago, all but a miniscule number of Blacks were excluded from the profession. In fact, as recently as 1950, Blacks were forced to invoke the powers of the United States Supreme Court in order to gain admission to tax-supported law schools in parts of this country. Although the situation has improved somewhat today, it would not be inaccurate to state that at our present rate of progress, we are still many years away from true equality in our justice system and proportionate representation of Blacks in the legal profession. Consequently, this country cannot achieve true equality of opportunity without affirmative action to correct past societal discrimination.

Blacks and other minorities, as well as women, stand to lose tremendous grounds which have been accomplished under the rubric of affirmative action. By affirmative action, we mean those series of programmatic efforts designed to fully integrate minorities and women in this country into equal employment opportunity, entrepreneurship and equal educational opportunity.

The American Business Council (ABC) is a non-profit, independent organization, incorporated in the District of Columbia on April 17, 1979. The purpose of ABC is to promote the business interests of its members and others similarly situated in public and private forums. Furthermore, it is the purpose of ABC to monitor, evaluate and disseminate information concerning contemplated, proposed and existing legislation and policy which affects or could affect the business interests of its members.

ABC believes that the continued growth and development of the American economic system is closely linked

to the inclusion of all business persons, regardless of race, in the mainstream of this country's economy. Consequently, the members of ABC have a direct interest in the arguments presented for the Court's consideration in this case, which is the question of the legality of the set-aside provisions in the Public Works Employment Act of 1977. The Act requires that 10% of all Federal funds appropriated for public works projects be expended on bids tendered by minority business enterprises.

Because ABC feels that the development of a sound minority business community is essential for the continued positive growth of the overall economy, it urges the Court to resolve this issue in favor of the respondents. Such a decision would be in the best interests of the country.

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STATEMENT OF THE CASE

On July 22, 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999. In May 1977, Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects.

The new statute, entitled the Public Works Employment Act of 1977 (hereinafter "PWEA"), Pub. L. No. 95-28, 91 Stat. 116, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. 6705(f)(2), the "minority business enterprise" provision (hereinafter "MBE" set-aside provision). Section 103(f)(2) provided that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under the Act * * * unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The circumstances under which the Secretary will waive the 10 percent minority set-aside requirement are detailed in regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)). Congress ensured that funds appropriated under the Act would reach the private sector by requiring state and local grantees to contract with private contractors for the construction of the projects. Section 103(e)(1), 91 Stat. 116, 42 U.S.C. §6705(e)(1).

As authorized by the Act, the Secretary of Commerce issued regulations (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434 (1977)) which required that at least 10 percent of each grant made under the Act must be expended for contracts with and/or supplies from minority business enterprises.

All grants authorized by the Act were awarded by September 30, 1977. The State of New York and New York City were among the grantees awarded funds.

On November 30, 1977, petitioners filed this action in the United States District Court for the Southern District of New York, seeking injunctive and declaratory relief. Petitioners contended that Section 103(f)(2) establishes an impermissible racial classification and violates the Fifth and Fourteenth Amendments, the Reconstruction civil rights statutes (42 U.S.C. 1981, 1983, 1985), and Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e). Petitioners sought to enjoin the Secretary of Commerce and the state and local entities that had received funds distributed under the Act from enforcing the minority business enterprise provision in Section 103(f)(2). Petitioners also sought a declaratory judgment that Section 103(f)(2) was unconstitutional.

The district court, after denying Petitioner's request for a temporary restraining order and consolidating their request for preliminary injunction with a trial on the merits, held that the minority business enterprise provision of the Act was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry.

The court of appeals affirmed (Pa23-Pa41). In upholding the minority business enterprise provision, the court stated that it was unnecessary for it to determine "[w]hether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race * * * for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster" (Pa28). The court of appeals agreed with the district court that the minority business

enterprise provision in the 1977 Act was intended to remedy past discrimination against minority construction businesses (Pa32). The court also agreed with the district court that there was an ample basis to support Congress' conclusion that the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical exclusion from the mainstream economy and that "the history of discrimination was specific to the construction industry" (Pa35-Pa36).

The court of appeals then analyzed the adverse effect of the minority business enterprise provision on non-minority contractors. The effect, the court concluded, was quite limited and did not fall upon a " 'small, ascertainable group of non-minority persons' " (Pet. App. 38a, quoting from *EEOC v. Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976).

ARGUMENT

The minority business enterprise set-aside provision as contained in Section 103(f)(2) of the Public Works Employment Act, 1977, 42 U.S.C. §6705(f)(2), is constitutionally permissible as a remedy for the effects of past discrimination.

A. *The Need for the MBE set-aside provision*

The matter currently before the Court is the third major confrontation on the issue of affirmative action within the past two years. In the first case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 98 S. Ct. 2733 (1978), the Court was asked to review an admissions program of a University designed to seek the admission of a certain specified percentage of minority students. In *Bakke, supra*, the Court struck down the special admissions program of the University but held that race may be taken into account when it acts to remedy the past effects of racial discrimination. In the second case *United Steelworkers v. Weber*, — U.S. — (1979), 99 S. Ct. 2727 (1979), this Court was asked to review the legality of private voluntary affirmative action plans which were designed to eliminate racial imbalance in certain job categories. In *Weber, supra*, the Court held that the use of private voluntary affirmative action plans does not violate the provisions of Title VII. In the matter *sub judice*, the Court is being asked to declare unconstitutional a provision (Sec. 103(f)(2) on the PWEA) of an act of Congress which requires that a certain percentage (in this case 10%) of funds (authorized for capital development and improvement) be set aside for minority business enterprises. Of the three cases, this case may be the most important one because of its long range implications to the minority community. The present case then presents issues that will have a profound impact on our society. Affirmative

action, as a concept and a method of eradicating the effects of past discrimination, has been traditionally limited to the area of employment and academic admissions. Congress, in enacting the MBE set-aside provision, has for the first time expanded the concept and utility of affirmative action to the marketplace. Congress has decided to use its considerable economic clout as a major consumer and purchaser of goods and services and major funding source to hasten the development of minority business enterprises in the marketplace of the construction industry. Minority businesses, like their individual counterparts in the employment and academic admissions context, have faced tremendous obstacles to their entry, as legitimate competitors, in the marketplace in general for their goods and services and in the market place of the construction industry in particular.

There are literally thousands of minority businesses in this country which are not in the mainstream of our economy because of the past and present effects of societal discrimination. If minority businesses are to develop and compete on an equal footing with non-minority business enterprises they must have unrestrained access to the marketplace, and must be freed from the past and present effects of racism and societal discrimination.

The concept of societal discrimination is useful to describe the phenomenon whereby discrimination in one economic sector[1] affects outcomes in another sector.[2] It also encompasses the fact that present discrimination and the effects of past discrimination in employment, education, housing, and other areas of private and public life interact with one another. *See, e.g.*, U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). Its emphasis is on systems of discrimination and their resulting

1. In this case, employment in the construction industry.
2. In this case, entry of minority business enterprises into the marketplace of the construction industry.

conditions, not on any need to identify individual entities which may legally be held responsible for causing those conditions.

When used in this sense, societal discrimination describes that kind of institutional discrimination which has prevented minority business enterprises from entering our free market economy to compete with their non-minority counterparts. If this Court requires that some evidence of a legal violation be acknowledged to exist as a pre-condition for this type of affirmative action, it would limit affirmative action to employment and academic admission matters. The result would be to freeze societal discrimination into the social and economic order. The MBE set-aside provision is a prototype provision for future set-aside arrangements on the local, State, and Federal levels in other industries that have traditionally excluded minorities and erected artificial barriers against their entry into the marketplace. We view the MBE set-aside provision in the context of this case to be a legitimate exercise of Congress' power and authority to eradicate the vestages of past discrimination.

The marketplace would not, in the absence of a requirement to do so, freely select minority business enterprises to supply it with goods and services. This is especially true in the context of the construction industry which is no stranger to racism and the studied exclusion of minorities in an employment context in that industry. Certainly, we cannot expect that same industry to freely select minority business enterprises to supply it with goods and services.

Minorities, especially Blacks, have been far too long excluded from being owners and developers of their own endeavors or enterprises because of numerous artificial barriers placed in their development. The development of minority enterprises inevitably has a positive impact on our economy. Given the high rate of unemployment in the

minority community, minority business enterprises afford more of a real opportunity for numerous members of the minority community to be employed and thus alleviate the serious unemployment problem in this country. Minority enterprises are valuable resources that have been allowed to remain idle for too long. Economic efficiency requires, first, that available resources be actually utilized in the production of goods and services rather than allowed to be idle. Unutilized resources—both human and property—obviously mean waste and inefficiency.

B. *The MBE set-aside provision is a necessary remedy for past discrimination in the marketplace of the construction industry*

The legislative debate that proceeded the Congressional approval of the MBE set-aside provision clearly discloses the connection between the past discrimination and the set-aside provision. The court of appeals noted the history of discrimination was specific to the construction industry. In fact, the court stated that:

> "a report prepared by the House Sub-Committee on Small Business Administration Oversight and Minority Business Enterprise contains the following statement:
>
> 'The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its fact, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry in particular*. However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them.'" 584 F.2d at p. 606.

The petitioners argue that the legislative history is silent with respect to delineating the purpose for the MBE set-aside provision. As the court of appeals noted:

> "There is no need to rely solely on a bare presumption to determine the purpose of Congress. The classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors. * * * It is beyond dispute that the set-aside was intended to remedy past discrimination." 584 F.2d at p. 605.

This was obviously the intent of Congress when it enacted the MBE set-aside program to alleviate unemployment and to utilize minority business enterprises in its effort to combat unemployment. There can be little doubt of that intention.

The Civil Rights Commission found in its examination of the statistics in the 1974 EEO-3 reports of 15 major building trades unions that, at most, minorities constituted 6.2% of journeymen working in the construction industry in 1972, and more likely only 5.5%.[3] It is safe to state, as did the Civil Rights Commission in 1976, that:

> [T]he percentages of minorities . . . among journeymen in the construction industry are extremely low, whether compared with population or relevant labor force statistics. Report at 52.

The Civil Rights Commission concluded that the "extremely low" percentages of minorities within the con-

3. The difference in percentages reflects irregularities in data provided by the unions on the EEO-3 forms, including: failure to report; overestimation of minority membership; categorical combining of non-construction and semi-skilled workers with construction journeymen; combining apprentices with journeymen; and failure to report actual referral opportunities. Report at 38.

struction industry resulted from two sources: (1) overt discrimination and (2) institutional discrimination. Such overt discriminatory practices included, among other things, "white only" clauses in many union constitutions until the mid-1960's and exclusion of minorities from participation in apprenticeship examinations. The Report recognized that while overt discrimination is not as "widespread as it once was, it is far from uncommon" (Report at 92) and that although a few "progressive locals" have made the entry of racial minorities a "relatively routine matter" *id.*, the most common form of discrimination which accounts for the continued exclusion of racial minorities is the use of seemingly neutral practices that disproportionately exclude them.

As for institutional discrimination, the Report states:

> Institutional discrimination occurs when policies and practices used in selecting apprentices and applicants for membership and employment have an adverse impact on minorities and women, even when these policies and practices are not intentionally applied in a discriminatory manner. The adverse effect these policies and practices have on minority groups may have been caused by the past intentional discriminatory policies of a union or by economic, educational, and social disparities in the society. Whatever the cause, the effect is exclusion from employment. Report at 64.

The Report identified, and discussed at length, four common institutional practices within building trade unions which have caused the virtual exclusion of significant numbers of racial minorities: (1) membership selection practices; (2) restrictions on the size of membership; (3) methods of recruitment; and, (4) examinations. Report at 65-92.

In summary, the Civil Rights Commission concluded:

> The effect of intentional and direct employment discrimination in the building trades continues to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunities of minorities and women is unfortunately quite small. Report at 94.

The practice of racial discrimination in America has shown itself to be remarkably durable. It has persisted in the face of sustained opposition for over three centuries. It has survived the destruction of the plantation economy which provided it with its most explicit justification. Incursions made during the Reconstruction period were quickly beat back. The prohibitions of Constitutional amendment and statutory enactment have debilitated it little. It has shown great resilience to the contemporary attacks generated by what may be viewed as America's second attempt at "Reconstruction."

This evil, racial discrimination, may never be mitigated without some form of preferential treatment. Justices Brennan, White, Marshall, and Blackmun noted that:

> "* * * in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefitted suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs

> designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. (*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 98 S. Ct. 2733, 2787. See Justice Powell's response at page 2658, fn. 44).

The history of this past discrimination in an employment context was the impetus for the enactment of Title VII of the Civil Rights Act of 1964. It demonstrates that Congress realized that the present effects of past racial discrimination could not be remedied by being neutral on the question of race, in the area of employment. Congress has now chosen by its enactment of the MBE set-aside provision not to remain neutral on the question of minorities participating in our economy and sharing in the development of public projects, not necessarily as employees but as entrepreneurs. What is needed and what Congress intended, was preferential treatment.

Blacks have suffered the dehumanizing effects of racism since the inception of this nation. Fear and racial hatred have assumed many disguises throughout our history. For though the chains and whips have been discarded, more sophisticated methods and institutional practices are used today to perpetuate the effects of racism.

In both the North and the South, the black slave was barred from almost every avenue leading to a productive, dignified existence. And his experience in the labor market, over the last two centuries, is one of the best illustrations of the lasting effects of institutionalized slavery.

In the South, after the Civil War, the black man seeking a job found that the years of enslavement had predetermined that he was to be admitted to the lowest forms of employment, even though, quite frequently, he

was a skilled craftsman. It is commonly known that during slavery, Blacks were used as domestics and unskilled laborers. A less commonly known fact is that the slaves, ". . . were also, to a large extent, the craftsmen and mechanics. They were carpenters, bricklayers, painters, blacksmiths, harness workers and shoemakers. For even skilled labor was degraded and whites had often been denied the opportunity of acquiring training since masters had preferred to work with slaves." Myrdal, Gunther, *An American Dilemma* (New York, 1944). White artisans strongly protested against the use of slaves for skilled craft labor, but the skilled slave was protected by his more politically powerful master. However, after the Emancipation, the black artisan was on his own. His former master no longer had an interest in protecting him against his white competitor. See Myrdal, *supra*.

The history of organized labor tells a similarly sad tale of exclusion of the black worker.[4] "From its inception as a national movement, organized labor found it necessary to deal with the prevailing attitudes of American society toward the black population. In 1866, the National Labor Union held its first convention, and was immediately confronted with the need to formulate a policy on racial practices. At its second convention in 1869, it requested black delegates to form their own "all-Negro labor organizations." Ross and Hill, *Employment, Race and Poverty* (New York, 1967), p. 365. The National Labor Union's policy of exclusion of Blacks was adopted by many major unions. "The history of the American

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4. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); and *Equal Employment Opportunity Commission v. Local 638, Sheet Metal Workers*, 532 F.2d 821 (2d Cir. 1976).

Federation of Labor (AFL), the most successful national labor organization, demonstrates that labor unions not only accepted racial discriminations but significantly contributed to the pattern of discrimination and segregation." *Ross & Hill, Id.*, at 366. AFL unions used a variety of tactics to eliminate or limit Blacks as a group from competition in the labor market. They excluded Blacks from membership by racial provisions in their constitutions or ritual by-laws or by tacit agreement in the absence of written provisions. Segregated locals and "auxiliary" locals are established by the larger unions. The black worker was extended the privilege of joining and paying dues but, generally, he was barred from participating in union affairs and contract negotiations. *Northrop, Organized Labor and the Negro* (New York, 1971), p. 2. AFL unions also controlled licensing boards that excluded black workers from craft occupations and apprenticeship training programs. *Ross & Hill, supra.* Blacks were also denied access to union hiring halls where such halls were the exclusive source of labor supply.

The consequences of these institutional practices of discrimination against the black worker remain manifest. By the turn of the century, this color-caste system had become firmly entrenched. By 1900, Blacks had become almost completely segregated from the mainstream of labor by law and by custom.

> "In the last years of the nineteenth century and in the first decades of the twentieth, the harsh discriminatory racial practices of AFL-affiliated unions and the railroad brotherhoods were decisive factors in developing the pattern of Negro job limitations that was to continue for many generations. Because of the AFL's craft orientation and discriminatory practices, most unions refused to organize Negro workers in the 1900's, thus denying them trade union protection during a period of intense labor exploitation. The consequences of the pattern of discriminatory racial practices by organized labor was an important and in some instances decisive factor in the barring of Negroes from full and equal protection in the economic life of the nation." *Ross, supra.*

And:

> "During the period 1860-1910, craft unions contended that they were not acting with any malice towards Negroes; they did rearticulate, in a new form (into our industrial structure), which has pervaded the social structure and social consciousness of society in the United States. Since "socially," Negro inferiority is sanctioned, unions have used exclusion as an economic weapon to maintain and raise the economic social status of their members. The acceptance of Negro subjugation is linked partially, with economic preservation in an unstable society: the latter fits well with the doctrine of job scarcity. Thus, artificial restriction serves at least a two-fold purpose: (1) it enhances the bargaining power of the union; (2) it increases the union's economic control over its membership." Black, *Labor and the Negro*, 1866-1910, 50 Journal Negro History 163 (1965).

The Blacks who migrated to the North entered the unskilled, manual jobs in steel mills, auto plants, road maintenance, laundries, feed industries and some branches of the needle trades. As a rule, these were the jobs that Whites and immigrants did not want or had vacated to take better positions.

The entry of Blacks into the Northern labor market was further hampered by the prevailing racial attitudes of that period. The white workers strongly resented the immigration of blacks to the North, especially when the

black workers were brought to the North by employers to be used as strikebreakers, cheap labor, or as a means to overt unionization. See, *Marshall, The Negro and Organized Labor* (N.Y. 1965), p. 21.

The hostility and aggression of the white workers took on many forms. Blacks were victimized and terrorized by riots and other acts of violence. In 1917 and 1919 tensions between the white workers and the Blacks from the South erupted into some of the most bitter and bloody race riots in this country's history. St. Louis and Chicago became the battle-grounds of fierce, racial conflicts.

It is submitted that these open and covert practices of exclusion of black workers had the net effect of securing for the white worker and non-minority businesses the advantages of job security and economic development.

Petitioners would like this Court to overlook the history of black workers detailed above; and ignore the moral distinction between a racial classification designed to discriminate against those who have suffered the effect of slavery, and a racial classification that serves to eliminate the plight of these very people who have traditionally suffered from that discrimination.

Appropriately tailored numerical remedies have long been upheld as a viable means of restoring equality of opportunity to persons historically denied equal employment opportunities. Such remedies insure representation of qualified minorities in a workforce and, "promptly [operate] to change the outward and visable signs of yesterday's racial discrimination and thus, . . . provide an impetus to the process of dismantling the barriers, psychological or otherwise, enacted by past practices." *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974). It has been held that absent such numerical remedies, "[a]dequate relief may well be denied." *Id.* at 765.

This Court stated that, "ordinarily such relief will be necessary to achieve the 'make whole' purposes of the Act." *Franks v. Bowman Transportation Co., supra* at 766.

In *NAACP v. Allen, supra*, where the district court found that because of a history of racial discrimination, there was an absence of Blacks on the state police force, a quota system very similar to the one here at issue, was upheld on the basis that it was, "essential to make meaningful progress toward eliminating the unconstitutional practices and to overcome the patrol's 37-year reputation as an all-white organization . . ."

In *Allen*, the Court ordered the hiring of one qualified black for each white hired as a state trooper until 25% of the force was black. It further ordered that Blacks be admitted to each training position until Blacks comprised 25% of the training positions.[5]

It is submitted that plans designed to provide relief as remedy for past discrimination have been uniformly upheld by the courts. *See, e.g., Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert. denied*, 416 U.S. 950 (1972); *United States v. I.B.E.W.*, Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

5. The 1970 Census revealed that 26.2% of the Alabama population was Black.

Thus, until the evil effects of past discrimination are eradicated, the courts must continue to sanction race-conscious numerical remedies even in a non-employment context. And this type of preferential treatment merely fosters the ideal of equality, a concept articulated in the Constitution.

In this historically significant case, which may have an adverse impact on millions of minorities and women, the issues go beyond the mechanical interpretations of the MBE set-aside provision. This provision was not promulgated in a vacuum. It was born out of Congress' deep understanding of the plight of minority businessmen in general and minority businessmen in the construction industry in particular in entering the marketplace to sell their goods and services.

CONCLUSION

Amici Curiae respectfully submit that the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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